No 4105

1363

United States

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Circuit Court of Appeals

For the Ninth Circuit.

/

ELOESSER-HEYNEMANN COMPANY, a Corporation,

Appellant,

vs.

KUH BROS., a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

N. A. ACKER, Esq.,
Foxcroft Bldg., San Francisco, California.
Attorney for Appellant.

JOHN H. MILLER, Esq.,
Crocker Bldg., San Francisco, California.
Attorney for Appellee.

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

IN EQUITY—No. 615.

ELOESSER HEYNEMANN CO., a Corporation,
Plaintiff,

vs.

KUH BROTHERS, a Corporation,
Defendant.

Bill of Complaint.

Eloesser Heynemann Co., a corporation duly organized and existing under and by virtue of the laws of the State of California, having its principal place of business in the city and county of San Francisco, State of California, a citizen of said State, and a resident and inhabitant of the Northern District thereof, as plaintiff, brings this, its bill of complaint against Kuh Brothers, a corporation duly organized and existing under and by virtue of the laws of the State of California, a citizen of said

State, and a resident of and having a regular and established place of business in the city and county of San Francisco, State of California, within the Northern District of California, within which district the acts of infringement hereinafter mentioned are charged to have been committed, as defendant, and the plaintiff complains and says:

I.

The grounds upon which the jurisdiction of the Court depends is that this is a suit arising under the patent laws of the United States.

II.

That heretofore, to wit, on and prior to the seventh day of May, 1919, Julius Miller and David Macowsky, citizens of the United States, residents of the city and county of San Francisco, State of California, were the original, first, and joint inventors of a new, useful, and ornamental design for child's rompers; that on the seventh day of May, 1919, they jointly made due and [1*] proper application to the United States Patent Office for the issuance unto them jointly of design letters patent of the United States for the term of fourteen years for the said design invention; that after the requisite legal proceedings taken in connection with the said filed application, there was issued, granted and secured unto them jointly, their heirs, assigns, and legal representatives, in accordance with and under the laws of the United States thereto pertaining design letters patent of the United States No. 56,450 for the full term of fourteen years, from and after the

*Page-number appearing at foot of page of original certified Transcript of Record.

26th day of October, 1920, which said design letters patent are still in full force and effect; that a more particular description of the said invention patented in and by said letters patent will more fully appear from the said letters patent themselves, a certified copy of which is ready in Court to be produced, and profert is hereby made thereof.

III.

That on the 8th day of March, 1921, the said Julius Miller and David Macowsky, duly and regularly by an instrument in writing duly recorded in the United States Patent Office transferred unto the plaintiff herein, its successors and assigns, all right, title and interest in and to the said Design invention and the Design Letters Patent No. 56,450 granted therefor on the 26th day of October, 1920, for the full remaining unexpired term thereof, together with all claims and demands both at law and in equity which they the said Julius Miller and David Macowsky had or held for past infringement thereof, as fully and entirely as the same would have been held and enjoyed by them, their heirs, assigns and legal representatives, together with the right to institute suit at law or in equity for the recovery of damages and profits for such past infringement of the said letters patent, as by said assignment or duly authenticated copy thereof, all of which will more fully and at large appear from a duly authenticated copy of said assignment, profert of which is hereby made.

IV.

That the invention of the said design letters

patent is [2] of great value and has been extensively manufactured and sold by the plaintiffs herein, and that the public has generally acquiesced in the validity of the said design letters patent, and that in the exercise of the exclusive rights and privileges granted and conferred by the said design letters patent, the plaintiff herein has manufactured and is now manufacturing child's rompers covered by the said design letters patent, and that it has manufactured and sold a large number of child's rompers embodying and containing therein the said design invention of the said design letters patent, and that upon each and every of said child's rompers so manufactured and sold, as aforesaid, the plaintiff has marked, or caused to be marked thereon the words "Patented," together with the date and year said design letters patent were granted, and, as hereinafter set forth, plaintiffs would now enjoy the exclusive right, liberty and privilege of making, using and vending to others to be used child's rompers embodying said patented design, which said right, liberty and privilege has been of great and incalculable benefit and advantage to plaintiff herein, and would continue to be of such value and benefit but for the unlawful and infringing acts of defendant herein specified.

V.

That since the grant, issuance and delivery of the letters patent aforesaid No. 56,450, and prior to the bringing of this suit, and within six years last past, in the Northern District of Californa and elsewhere, and against the will of plaintiff herein, the defend-

ant herein has made, used and sold, and caused to be made, used and sold, child's rompers embodying the patent design invention aforesaid in infringement of the said Design Letters Patent No. 56,450, and has manufactured and sold in large quantities child's rompers in imitation of child's rompers embodying said patented design; that defendant herein has been advised by the plaintiff herein of its rights, and has been requested to desist from its unlawful and infringing acts aforesaid, but the said defendant herein has failed and refused, [3] and continues to refuse to desist from same, and continues and threatens to continue the manufacture, using and selling, and causing to be manufactured, used and sold, child's rompers embodying therein the design invention of said Letters Patent No. 56,450 and infringing the said letters patent, all to the great and irreparable injury of plaintiff herein, and for which the said plaintiff has no plain, speedy, nor adequate remedy at law; that by reason of the infringing act aforesaid the defendant herein has realized and is realizing great benefits and profits which rightfully belong to the plaintiff herein; that the said plaintiff has suffered, and is now suffering great and irreparable injury and damage by virtue of said infringing acts aforesaid, but the amount of said profits and damages is unknown to the plaintiff herein and can be ascertained only by an accounting.

VI.

That the plaintiff herein is a large manufacturer, and in the exercise of the rights and privileges conferred upon it by said letters patent, and in the en-

joyment of the same, has hitherto preserved and still desires and endeavors to preserve unto itself exclusively the manufacture and sale of child's rompers containing and embodying the said patented design invention, throughout the territory covered by the said letters patent now owned and controlled by the said plaintiff; and has been and still is desirous of preserving unto itself the exclusive right, belonging to it under said letters patent, of conferring the right to manufacture, use and sell said patented design invention upon those alone who purchase the same from the plaintiff herein; and the plaintiff is well fitted for such manufacture and sale, and is capable of supplying the entire market, and has, ever since acquiring the said design letters patent, supplied and filled all demands and orders made upon it for child's rompers embodying the said design invention, and that it has never acquiesced in any invasion or infringement of its rights under said design letters patent.

And for as much as plaintiff herein has no plain, speedy, [4] or adequate remedy in the ordinary Courts of Law, and cannot have adequate relief save in a Court of Equity where matters of this kind are properly cognizable and relievable.

WHEREFORE the plaintiff prays judgment and decree against defendant, as follows:

First. That upon final hearing the defendant herein, its officers, agents, servants, attorneys, workmen and employees, and each of them be enjoined and restrained from manufacturing, using and selling child's rompers manufactured under, and which

infringe upon, said United States Design Letters Patent No. 56,450, of October the 26th, 1920, and that a writ of injunction be issued out of, and under the seal of this Court, enjoining said defendant as aforesaid:

Second. That upon the filing of this bill of complaint, an injunction *pendente lite* be issued enjoining the defendant, its officers, and other representatives above mentioned, and each of them, until final hearing of this cause, from making, using or selling any child's rompers manufactured under and which infringe said Design Letters Patent No. 56,450 aforesaid.

Third: That the plaintiff have and recover from the defendant herein, the damages which it has sustained, and the profits realized by the defendant from and by reason of the infringement aforesaid, together with the costs of suit, and for such other and free relief as to this Court may seem proper and in accordance with equity and good conscience.

ELOESSER HEYNEMANN, CO.

By N. A. Acker,

(Its Solicitor and Counsel.)

[Endorsed]: Filed May 17, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [5]

(Title of Court and Cause.)

Answer of Defendant to Plaintiff's Bill of Complaint.

Now comes Kuh Brothers, a corporation, defendant in the above-entitled suit, and for answer

to the plaintiff's bill of complaint, denies, avers and alleges as follows:

1. Answering paragraph I of said bill, defendant admits the allegations thereof.

2. Answering paragraph II of said bill, defendant says that it is without knowledge as to whether or not on or prior to the 7th day of May, 1919, or any other time, Julius Miller and David Macowsky, citizens of the United States, or residents of the city and county of San Francisco, State of California, or of any other place, were the original, first and joint, or the original, first or joint inventors of the alleged new, useful and ornamental design for child's rompers referred to in paragraph II, or on the seventh day of May, 1919, or any other date, they jointly or otherwise made due or legal or any application to the United States Patent Office for the issuance to them jointly or otherwise of design letters patent of the United States for the term of fourteen (14) years or any other term for the said design invention, or that after the requisite or any legal proceedings taken in connection with said filed application there was issued, granted or secured upon them jointly or otherwise, their heirs, assigns and legal representatives, in accordance with or under the laws of the United States thereto pertaining or otherwise, design letters patent of the United States, No. 56,450, for the full term of fourteen (14) years or any other term from and after the 26th day of October, 1920, or any other date, or that said design letters patent are still in full force and effect, or that a more particular description of

said alleged invention claimed to be patented in and by said letters patent will more fully appear from the said letters patent themselves, [6] or that a certified copy thereof is ready in court to be produced.

3. Answering paragraph III of said bill, defendant says that it is without knowledge as to whether or not on the 8th day of March, 1921, or any other day, the said Julius Miller and David Macowsky duly or regularly or otherwise by an instrument in writing duly or otherwise recorded in the United States Patent Office, transferred unto the plaintiff herein, its successors or assigns, all or any right, title or interest in and to the said design invention, or the Design Letters Patent No. 56,450, alleged to have been granted therefor on the 26th day of October, 1920, for the full remaining unexpired term thereof or any other term, or together with all or any claims or demands either at law or in equity, which the said Julius Miller and David Macowsky had or held for past infringement thereof, as fully and entirely as the same would have been held and enjoyed by them, their heirs, assigns, or legal representatives, or otherwise, or together with the right to institute suits at law or in equity for the recovery of damages and profits for such past infringement of said letters patent, or that by said assignment or a duly authenticated copy thereof, all of which will more fully or at large appear.

4. Answering paragraph IV of said bill, defendant denies that the alleged invention of the said design letters patent is of great or any value or has

been extensively manufactured or sold by the plaintiff herein, or that the public has generally or at all acquiesced in the validity of the said design letters patent, or that in the exercise of the exclusive rights and privileges alleged to be granted and conferred by such design letters patent or otherwise or at all, plaintiff herein has manufactured or is now manufacturing child's rompers covered by the said design letters patent, or that it has manufactured or sold a large or any number of child's rompers embodying or containing therein said design invention of the said design letters patent, or that upon each and every or any of said child's rompers so alleged to be manufactured and sold as aforesaid, plaintiff has marked or caused to be marked thereon the word "Patented," together [7] with the day and year said design letters were granted, or that plaintiffs would now enjoy the exclusive right, liberty and privilege of making, using and vending to others to be used child's rompers embodying said patented design, or that said right, liberty and privilege has been of great or incalculable or any benefit or advantage to the plaintiff, or would continue to be of such value or benefit but for the alleged unlawful and infringing acts of defendant.

5. Answering paragraph V of said bill, defendant denies that since the grant, issuance or delivery of the letters patent aforesaid, No. 56,450, or prior to the bringing of this suit, or within six (6) years last past, or at any other time, in the Northern District of California, or elsewhere, or any other place, or against the will of the plaintiff, defendant

has made or used or sold or caused to be made, used or sold child's rompers, embodying the patented design invention aforesaid, infringement of the said Design Letters Patent No. 56,450, or has manufactured or sold in large or any quantities child's rompers in imitation of the child's rompers embodying said patented design, or that the defendant has been advised by the plaintiff of its said alleged rights, or has been requested to desist from its alleged unlawful and infringing acts, or that the defendant herein has failed and refused, or continues to refuse to desist therefrom, or continues or threatens to continue the manufacture, using and selling, and causing to be manufactured, used or sold, child's rompers embodying therein the design invention of said Letters Patent No. 56,450, or infringing the said letters patent, or that any acts or doings of this defendant were or are to the great or irreparable or any injury of the plaintiff, or that for the same plaintiff has no plain, speedy or adequate remedy at law, or that by reason of the alleged infringing acts aforesaid this defendant has realized or is realizing great or any benefits or profits which rightfully belong to the plaintiff herein, or any benefits or profits, or that the said plaintiff has suffered or is now suffering great or irreparable or any injury or damage by [8] virtue of the alleged infringing acts of defendant aforesaid.

6. Answering paragraph VI of said bill, defendant is without knowledge as to whether or not the plaintiff is a large manufacturer or in the exercise

of the rights or privileges conferred upon it by the said letters patent, or in the enjoyment of the same, has hitherto or still desires or endeavors to preserve unto itself exclusively the manufacture and sale of child's rompers containing and embodying the said patented design invention, throughout the territory covered by the said letters patent, now owned or controlled by the said plaintiff, or has been or still is desirous of preserving unto itself the exclusive right belonging to it under said letters patent, of conferring the right to manufacture, use and sell said patented design invention upon those alone who purchase the same from the plaintiff herein, or that the plaintiff is well fitted for such manufacture or sale, or is capable of supplying the entire market, or has ever since the acquiring of said design letters patent or at any time supplied or filled all demands or orders made upon it for child's rompers embodying the said design invention, or that it has never acquiesced in any invasion or infringement of its rights under said design letters patent.

II.

And for a further and separate defense defendant avers that the letters patent in suit are void and of no effect in law for the reason that the faculty of invention was not required or exercised or used in producing the design described in said letters patent and sought to be patented by the claims thereof.

III.

And for a separate and further defense defendant avers that Julius Miller and David Macowsky, the parties named as patentees in the patent in suit,

were not the original and joint inventors of the thing sought to be patented in and by the said patent, nor of any material or substantial part thereof, but prior to the supposed invention of the said thing sought to be patented, the same was shown, indicated, described and patented in [9] and by the following named United States letters patent, issued to the following named persons and in and by the following named printed publication, viz.:

PRIOR PATENTS.

Name of Patentee	No. of Patent	Date of Patent.	Present Residence
Wm. I. Zidell	52,720 (Design)	Nov. 19, 1918	Los Angeles, Cal.
Wm. I. Zidell	54,809 (Design)	Mch. 23, 1920	Los Angeles, Cal.
Geo. Averill	47,447 (Design)	June 15, 1915	Los Angeles, Cal.
Simon E. Davis	51,674 (Design)	Jan. 8, 1918	San Francisco, Cal.
Mary T. Verde	1,255,491	Feb. 5, 1918	Boston, Mass.

PRINTED PUBLICATIONS.

DUTCH TWINS, published in 1911, by Houghton-Mifflin Co., at Cambridge, Massachusetts; Author, Lucy Fitch Perkins, cover pages 1, 2, 5, 10, 15, 20, 31, 32, 40, 44, 53, 54, 136, 147, 187 and 191.

PICTORIAL REVIEW, published by The Pictorial Review Co., at 200 West 39th St., New York City, N. Y., issue of May, 1917.

GOOD DRESSING, published by Home Pattern Company, at 18 East 18th Street, New York City, N. Y., issue of February 1917, page 5.

GOOD DRESSING, published by Home Pattern Company, at 18 East 18th Street, New York City, N. Y., issue of April 1918, page 11.

VOGUE, published by The Vogue Company at 19 West 44th Street, New York City, issue of July 15, 1915, page 58.

VOGUE, published by The Vogue Company at 19 West 44th Street, New York City, N. Y., issue of September 15, 1915, page 77; issue of February 15, 1916, Romper No. 3257; issue of April 15, 1917, Romper No. 3787.

LADIES' HOME JOURNAL, published by the Curtis Publishing Co., at Philadelphia, Pa., issue of April 1916, page 116. [10]

MARKEN AND ITS PEOPLE, published by Moffatt, Yard & Co., at 116–120 West 32 Street, New York City, N. Y., author George Wharton Edwards, in 1912, page 18.

HOLLAND AND THE HOLLANDERS, published by Dodd, Mead and Company, at Fourth Avenue and 30th Street, New York City, N. Y., author David S. Meldrum, in 1898 and 1904, pages 16, 160 and 371.

THINGS SEEN IN HOLLAND, published by E. P. Dutton & Co., at 31 West 23d Street, New York City, N. Y., author Charles E. Roche in 1909, and 1911, page ——.

THREE VAGABONDS IN FRIESLAND, with a Yacht and Camera, published by E. P. Dutton & Co., at 31 West 23d Street, New York City, N. Y., author H. F. Tomalin, in 1907, pages 42 and 43.

HOME LIFE IN HOLLAND, published by the MacMillan Co. at 66 Fifth Avenue, New York City, N. Y., author David S. Meldrum, in 1911. page 180.

CATALOGUE, issued by Taber-Prang Art Co. at Springfield, Massachusetts, in 1907, at page 188.

HOLLAND SKETCHES, published by Charles Scribner's Sons, at 153 Fifth Avenue. New York City, N. Y., author Edward Penifield in 1912, page 94.

NATIONAL GEOGRAPHIC MAGAZINE, published by the National Geographic Society at Washington, D. C., issue of January, 1915, pages 26 and 28.

THE ELITE STYLES, published by the Elite Pattern Co. at 26 Union Square, New York City, N. Y., issue of April, 1911, page 35.

THE ELITE STYLES, published by the Elite Pattern Co. at 26 Union Square, New York City, N. Y., issue of September, 1916, page 48.

LADIES' HOME JOURNAL, published by Curtis Publishing Co. at Philadelphia, Pa., issue of May, 1916, page 80.

THE MODERN PRISCILLA, published by the Priscilla Publishing Company, at 85 Broad Street, Boston, Massachusetts, [11] issue of March, 1917, page 35.

WOMAN'S HOME MAGAZINE, published by the New Idea Publishing Company, issue of May, 1917, page 55, at New York City, N. Y.

CATALOGUE No. 83, published by Montgomery Ward & Co., at Chicago, Ill., for the year 1915, page 159.

CATALOGUE No. 86, published by Montgomery Ward & Co., at Chicago, Ill., for the year 1916, page 152 and page 336.

CATALOGUE No. 67, published by Bellas, Hess & Co., at Washington, Morton and Barrow Streets, New York City, N. Y., issued in 1915, page 155.

CATALOGUE No. 90, published by Montgomery, Ward & Co., at Chicago, Ill., page 131.

IV.

And for a separate and further defense, defendant avers that Julius Miller and David Macowsky were not the original and first inventors of the thing sought to be patented in and by the letters patent in suit, but prior to the supposed invention thereof by the said Julius Miller and David Macowsky the said thing sought to be patented was known to and used by the following named persons having the following named residences at the following named places, to wit:

By William I. Zidell, at Los Angeles, California, and his residence is Los Angeles, California.

By George Averill, at Los Angeles, California, and his present address is Los Angeles, California.

By Mary T. Verde, at Boston, Massachusetts, and her present address is Boston, Massachusetts.

By Simon E. Davis, at San Francisco, California, and his present address is San Francisco, California.

By Levi Strauss & Company, a corporation created under the laws of the State of California, at San Francisco, California, and their present residence is San Francisco, California.

By Nathan Krauskopf, at New York City, State of New York, [12] and his present address is New York City, N. Y.

By Nathan Krauskopf Company, a corporation created under the laws of the State of New York, at the city of New York, State of New York, and its present residence is city of New York, N. Y.

WHEREFORE, this defendant prays that the plaintiff take nothing by this suit, and that the bill of complaint be dismissed with costs to defendant.

JOHN H. MILLER,
Attorney and Counsel for Defendant.

Service of the within answer admitted this 29th day of June, A. D. 1921.

N. A. ACKER,
Attorney for Plaintiff.

[Endorsed]: Filed Jun. 30, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [13]

(Title of Court and Cause.)

Amendment to Answer.

Now comes defendant, and by leave of Court first had and obtained, amends its answer in the above-entitled suit by adding thereto at the end of paragraph IV at line 27, page 9 of said answer the following, to wit:

"By H. Garfinkle at San Francisco, California, and his present residence is Oakland, California.

"By the California Art Works at San Francisco, California; discontinued business under said name.

"By E. J. Feisel at San Francisco, California, and his present address is San Francisco, California.

"By Louis Kuh at San Francisco, California, and his present residence is San Francisco, California.

"By Irwin D. Kuh at San Francisco, California, and his present residence is San Francisco, California.

"By Kuh Brothers, a corporation created under the laws of the State of California, at San Francisco, California, and its present address is San Francisco, California.

JOHN H. MILLER,
Solicitor and Counsel for Defendant.

Service of the within amendment to answer admitted this 26th day of May, A. D. 1922.

N. A. ACKER.

[Endorsed]: Filed Jun. 5, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [14]

(Title of Court and Cause.)

(Decision on Merits.)

Plaintiff owns Design Patent No. 56450 applied for May 7, 1919, and alleges infringement. The defenses are no invention by the patentee, anticipation, and prior publication. The only patent specification is "child's romper," illustrated by views, front and rear. These picture a garment of a horizontal line from the end of one short sleeve across the shoulders to the end of the other, notched with a square Dutch neck, belt at the arm pits and which might or might not indicate a detachable character, peg top long trousers, likewise, two ornamental

patch pockets below the belt and buttons at back of waist and belt. As manufactured by plaintiff, waist and trousers are sewed together in front and belt sewed over the seams, the whole of proportions varying considerably from those of the patent.

Subsequent to the patent defendant manufactured an identical garment, but on notice modified it to round neck, yoke in front and back of waist, front belt of two pieces sewed at the sides and one button in front, cuff-like bands at ends of sleeves, braid along outlines of bands and yoke, and pockets not patch but characteristically feminine, viz., rather concealed and inaccessible inside the flapping top or shoulder of the peg. To overcome the presumption of validity of the patent, defendant by plea and evidence presents a variety of patents and garments that singly or combined disclose every feature of plaintiff's and of date more than two years prior to the latter's application.

As a matter of fact plaintiff's garment is none other than the Hollandese boy's costume from time immemorial, known everywhere from use in original or modified forms, from paintings, engravings illustrations and literature, to an extent warranting judicial notice. [15]

See Office etc. Co. vs. Co., 174 U. S. 497;
New York etc. Co. vs. Co., 137 U. S. 450.

If, however, the last cited case relating to a design not thus known be construed to forbid judicial notice as aforesaid, it is only necessary to advert to defendant's evidence thereof, viz., illustrations in Perkins' "The Dutch Twins," published not later

than 1915 by "The Riverside Press," and various garments and designs of date not later, especially Averill's Design Patent No. 47447.

The general principles of patent law applicable to designs are sufficiently set out in the following decisions of the Appellate Court of this Circuit, viz.:

Majestic etc. Co. vs. Co., 276 Fed. 682;
Faris vs. Co., 273 Fed. 900;
Zidell vs. Dexter, 262 Fed. 145.

It is apparent that the design in suit is for a garment in entirety and not for mere accessories, ornamentation or other incidentals.

It follows that the peculiar and distinctive appearance and impression assumed to be invented, patented and controlled are not those of mere pattern outlines or flat display or incidentals, but are those presented by the garment as a whole when draped upon the person of the wearer. Hence, two such garments thus draped that in this appearance and impression are substantially alike, are of like design however they may vary in pattern details of curvatures and angularities, or differ in accessories of belt, yoke, bands, buttons, braid and the like. At best, changes therein are resort to equivalents. Defendant's garment in entirety is plaintiff's in appearance and impression, but in view of the prior state of the art, in the latter is no invention and in the former is no infringement.

There is no doubt of the oddity, quaintness and simple artistic merit of plaintiff's design, nor of the utility (sometimes of account even in design

patents), attractiveness, [16] popularity, and wide use of its garment.

In both, however, there is none of the patentee's genius of invention or artistry, but only the trade instinct of the manufacturer and salesman. For between plaintiff's design and garment and those of the illustrations of "The Dutch Twins," there is no substantial difference.

In appearance and impression they are alike, are one design, of which either patented, the other would anticipate or infringe. It follows that by reason of this anticipation, publication and lack of invention, plaintiff's patent is invalid.

The suit thus disposed of, it is unnecessary to inquire whether, if plaintiff's patent was valid as for a new combination of old elements, defendant's garment would infringe, save to observe that in proper application of the rule of Zidell vs. Dexter, *supra,* it would not infringe.

Decree for defendant, with costs.

April 7, 1923.

BOURQUIN,
J.

[Endorsed]: Filed April 7, 1923. Walter B. Maling, Clerk. [17]

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[18]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

Before Hon. GEORGE M. BOURQUIN, Judge.

No. 615—IN EQUITY.

ELOESSER HEYNEMANN COMPANY, a Corporation,

Plaintiff,

vs.

KUH BROS., a Corporation,

Defendant.

April 3, 1923.

Counsel Appearing:

For Plaintiff:

N. A. ACKER, Esq.

For Defendant:

JOHN H. MILLER, Esq.

Mr. ACKER.—If your Honor please, this is an action instituted by Eloesser-Heynemann Company, one of the largest manufacturers of garments, against Kuh Bros., for infringement of design letters patent of the United States, No. 56,450, granted under date of October 26, 1920, for what is known as a play suit for children, and more especially adapted for girls. We expect to prove in the present case that Kuh Bros. commenced the manufacture of what is known as play suits for girls, and had received notice of infringement from the owners of the Letters Patent, and the patentees thereof, and that on receiving notice Kuh Bros. thereupon called upon Eloesser-Heynemann Company and endeavored to solicit its aid in an endeavor to invalidate the letters patent. That Eloesser-Heynemann Company [19—1] took counsel as to whether or not the garment constituted an infringement of the design garment of the letters patent in suit, and being advised that it did constitute an infringement, took a license under the letters patent, and at a subsequent date acquired all right, title and interest in and to the letters patent. We propose to show that these garments were sold side by side in the open market, and are accepted by the

users of this class of garments as being one and the same article; in other words, there is no difference between the two, and that the sales, to a large extent, are directed to Kuh Bros. by reason of the fact that they undersell or sell at a lower price.

The action was commenced under Section 4929 of the Revised Statutes, as amended, which reads as follows:

"Any person who has invented any new, original, and ornamental design for an article of manufacture, not known or used by others in this country before his invention thereof, and not patented or described in any printed publication in this or any foreign country before his invention thereof, or more than two years prior to his application, and not in public use or on sale in this country for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceedings had, the same as in cases of inventions or discoveries covered by section 4886, obtain a patent therefore."

You therefore notice that that section provides for an article of manufacture.

At this time we wish to offer in evidence the letters patent in suit. I have the original of the letters patent, which I will hand to your Honor and ask that it be marked plaintiff's [20—2] Exhibit 1.

(The document was marked Plaintiff's Exhibit 1.)

I also offer in evidence the assignment or the transfer of the letters patent to Eloesser-Heynemann Company, the same being duly acknowledged before a notary public. This assignment carries all right of action for past infringements in law and equity. I ask that the same be marked Plaintiff's Exhibit 2.

(The document was marked Plaintiff's Exhibit 2.)

The COURT.—It will be admitted.

Mr. MILLER.—Your Honor, I have not seen this document at all; it seems to refer to a patent for a child's romper. I understood they were suing on what is known as a play suit.

The COURT.—If you have any objection state it.

Mr. MILLER.—I will have to read it over to see what it is. It has never been submitted to me before.

The COURT.—You have not seen a copy of it.

Mr. MILLER.—No.

Mr. ACKER.—It is in the usual form, transferring all right, title and interest in and to Letters Patent No. 56,450.

Mr. MILLER.—I will read it. It seems to be executed in due form, your Honor.

The COURT.—Proceed.

Mr. ACKER.—Unless you desire to make preliminary remarks to his Honor, I shall proceed with the testimony.

The COURT.—Call your first witness.

Testimony of Herbert Eloesser, for Plaintiff.

HERBERT ELOESSER, called for the plaintiff, sworn.

Mr. ACKER.—Q. Will you state your name, age, residence and occupation?

A. My name is Herbert Eloesser, I am 38 years old, [21—3] I am vice-president of Eloesser-Heynemann Co.

Q. For what length of time have you acted as vice-president?

A. I have acted as vice-president for about 15 years.

Q. State what length of time the corporation of Eloesser-Heynemann Co. has been established in business in the City and County of San Francisco?

A. The corporation was established as a corporation in 1905, but the business was established in 1851, about 70 odd years ago. The business has been practically in the same family ever since the time it was first begun.

Q. Please state the class of merchandise which constitutes the product of the Eloesser-Heynemann Co?

A. The Eloesser-Heynemann Co. is making overalls and other kindred lines, such as denim coats and work pants, union suits, and a very large proportion of that business is in play suits. They make some shirts, and make some workmen's pants, but they specialize in workmen's clothing, and are exclusively manufacturers.

(Testimony of Herbert Eloesser.)

Q. Has Eloesser-Heynemann Co. a manufacturing establishment in places other than in the City and County of San Francisco?

A. They have a number of branches where they carry stock, but it manufactures its goods solely in San Francisco.

Q. Please state when the Eloesser-Heynemann Co. first commenced to manufacture the play suit garment forming the subject matter of the letters patent in suit?

A. I think that we first began manufacturing this garment in May or June of 1919.

Q. Will you please state as fully as you can the history with reference to the manufacture of the play suit by Eloesser-Heynemann Co. involved in the present controversy?

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent. We are simply trying whether or not this patent is valid, and, second, whether or not it is infringed. I do not want to go into the history of the patent. [22—4]

The COURT.—What object will it serve?

Mr. ACKER.—I wish to show the manner in which Eloesser-Heynemann Co., the circumstances under which they acquire title to the letters patent in suit, and what induced the Eloesser-Heynemann Co. to take over the letters patent.

The COURT.—You want to show that, but what object will it serve?

Mr. ACKER.—It will shorten the testimony materially by giving the developments of this garment,

(Testimony of Herbert Eloesser.)

and the connection between Eloesser-Heynemann Co. and Kuh Bros. with reference to this suit and the acts of infringement.

Mr. MILLER.—I submit it is immaterial.

The COURT.—You may answer briefly. If not material, the Court will give it no consideration.

A. I will be just as brief as I can. We were requested by a large department store in Oakland, Whitthorn & Swan, to manufacture a play suit which was different from the only play suit that was being put on the market at that time.

The COURT.—Reframe your question, and bring him to something specific.

Mr. ACKER.—Q. Prior to acquiring title to the letters patent in suit, was your company manufacturing and offering for sale a play suit adapted for girls, a one-piece play suit?

A. Yes, we were.

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent.

The COURT.—I think so.

Mr. ACKER.—I hand you two garments, Mr. Eloesser, and ask you to examine the same and state if you can identify these garments?

A. Yes, Mr. Acker, I can identify this. This first [23—5] garment that I hold in my hand here is a garment covered by the patent, and it was manufactured by Miller & Macowsky, the original patentees.

Mr. MILLER.—I move to strike out the answer as incompetent, immaterial, and irrelevant. He

(Testimony of Herbert Eloesser.)

does not know what is covered by the patent. That is for your Honor. He was just asked if he recognized the garment.

Mr. ACKER.—Q. Do you recognize that as a garment manufactured by Miller & Macowsky?

A. I do.

Mr. MILLER.—It seems to me he ought to be examined as to how he knows Miller & Macowsky manufactured this garment.

The COURT.—I do not see that it is material. Proceed.

Mr. ACKER.—Q. What about the second garment?

A. The second garment is a garment which was put out by Kuh Bros. and which was a garment that follows the design which we notified Kuh Bros. was an infringement.

Q. Please examine the garment which I now hand you, and state if you can identify the garment.

A. Yes.

Q. What is that garment?

A. That is a garment which we are manufacturing at the present time.

Q. That is the garment which you are manufacturing under the letters patent in suit?

A. Yes.

Q. You have identified a garment which you said was manufactured by Miller & Macowsky. Do you mean by Miller & Macowsky the ones who procured the letters patent in suit here?

A. Yes; this is the garment that was manufac-

(Testimony of Herbert Eloesser.)

tured by Miller & Macowsky who procured the letters patent, and has the mark "Patented."

Q. How do you know that garment was manufactured by Miller & Macowsky?

A. I recognize it by the design, and by the label [24—6] on it, and by the fact that it was a garment which Miller & Macowsky gave me at the time we were in correspondence with them.

Q. Please compare that garment with the Design Letters Patent 56,450, the same being the letters patent in suit, and state whether that garment conforms thereto or diverges therefrom?

Mr. MILLER.—I object to the question as immaterial, irrelevant and incompetent.

Mr. ACKER.—We desire to show that the article was being manufactured under the letters patent in suit, and at the time that the plaintiff to the present action acquired title to the letters patent. In other words, it was not a paper patent, the patent itself was being manufactured and sold by the patentee.

Mr. MILLER.—I object to that as immaterial.

The COURT.—It would not prove of any materiality. The objection is sustained. Let us limit ourselves to what is material. Our experience is we always have enough to deal with with that alone.

Mr. ACKER.—Q. You have identified a garment which you said was manufactured by Kuh Bros., the defendant in the present action. How do you know that garment was manufactured by Kuh Bros., and how did you acquire it?

(Testimony of Herbert Eloesser.)

A. I acquired this garment by purchase, Mr. Acker; you asked us to obtain a garment of their design, of their manufacture, and I purchased it.

Q. You purchased it in the open market?

A. In the open market.

Mr. MILLER.—Q. From whom?

A. I do not recall, I believe it was O'Connor-Moffatt, Mr. Miller, but I am not perfectly certain.

Mr. ACKER.—Q. I hand you another garment, and ask you what that is?

A. This is a garment which is also manufactured by Kuh Bros., and was brought to me by Mr. Kuh, with the object of [25—7] showing what garments they were making, and with the intention, as he explained to me, of having us take these garments off his hands if he would discontinue manufacturing them. That is in connection with the history which I had intended to state.

Mr. ACKER.—I offer in evidence the garment which was identified by the witness as a product of Eloesser-Heynemann Co., and ask that the same be marked Plaintiff's Exhibit 3.

(The garment is marked Plaintiff's Exhibit 3.)

I offer in evidence the garment which has been identified by the witness and referred to as the first Kuh garment, and ask that the same be marked Plaintiff's Exhibit 4.

(The garment was marked Plaintiff's Exhibit 4.)

Then I offer the second garment made by the Defendant Kuh as Plaintiff's Exhibit 5.

(The garment was marked Plaintiff's Exhibit 5.)

(Testimony of Herbert Eloesser.)

Q. Were you manufacturing your garment at a time prior to acquiring title to the Letters Patent in suit. A. Yes.

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent.

The COURT.—I think so.

Mr. ACKER.—I think it is material, your Honor.

The COURT.—Why?

Mr. ACKER.—To show that these men were manufacturing this garment at a time prior to the acquiring of the letters patent in suit, and that the notification of infringement was given to them, in the action of the plaintiff under the notice of infringement.

The COURT.—Because he reasons the patent is valid, that does not have anything to do with it. The objection is sustained.

Mr. ACKER.—Q. Did I understand you to state that you had received notification of infringement from the owners of the [26—8] letters patent in suit?

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent.

The COURT.—Objection sustained.

Mr. ACKER.—Q. Did you at any time acquire a license under the letters patent in suit?

A. We did.

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent.

The COURT.—The objection is sustained.

Mr. ACKER.—Q. Please state whether or not

(Testimony of Herbert Eloesser.)

any other manufacturers, firms or corporations in this city are manufacturing at the present time the play suits of the letters patent in suit other than the defendant in the present action?

A. I know of nobody else.

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent.

The COURT.—I think he may answer. It may be one way of arriving at the fact that the defendant is, as they claim, infringing. Overruled.

A. I know of nobody who is manufacturing these play suits in this city, except Kuh Bros.

Mr. ACKER.—Q. What recognition, if any, has been given to the letters patent in suit by other manufacturers?

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent; the patent is *prima facie* evidence.

Mr. ACKER.—It goes to the point of proving public acquiescence in the letters patent in suit, and it is one of the allegations in the complaint that there has been acquiescence.

The COURT.—He may answer; if not competent, it will not be considered.

A. There has been a good deal of acquiescence, Mr. Acker. [27—9] There have been a number of large concerns that manufactured this garment at one time, and who, upon notification, have ceased manufacturing it.

Mr. ACKER.—Q. Please state in a general way, or please state as briefly as you can, what reception

(Testimony of Herbert Eloesser.)

the design garment manufactured and placed on the market by your concern has met with from the purchasing houses?

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent, and, furthermore, it is calling for the conclusion of the witness.

The COURT.—He may answer. Overruled.

A. The garment has met with a very ready reception. At the time it was first put out there was practically nothing available except the straight-legged play suits, and a long garment of ordinary overall style, and the public was delighted to receive something that had some design feature to it, and it was attractive and pleasing to the eye, and the business has grown as fast as we are able to take care of it. We have made large increases in our plant and in our capacity, and the business has grown as fast as we could handle it.

Mr. MILLER.—I move to strike out that portion wherein he stated as to how the public received it, and were pleased with it. I think that is his conclusion.

The COURT.—It will be allowed to stand; if not material the court will not consider it; the motion is denied.

Mr. ACKER.—Q. Please state whether or not, after acquiring title to the letters patent in suit, you notified the defendant as to your claimed infringement of your letters patent by reason of the garments they were manufacturing?

(Testimony of Herbert Eloesser.)

A. We did [28—10] notify them, and they were notified before.

Mr. MILLER.—We object to that.

The COURT.—Just answer the question.

Mr. ACKER.—Q. Did either member of the firm of Kuh Bros. hold any conversation with you after your service of notice of infringement?

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent.

The COURT.—He may answer. The objection is overruled.

A. Mr. Louis Kuh held a conversation with me at the time I first notified him verbally that his garment was an infringement on our design patent.

Mr. ACKER.—Q. Was any conversation held with him after you served written notice upon him?

A. Mr. Kuh wrote us a letter approximately at that time, I think it was after the notice, Mr. Acker.

Q. I hand you Plaintiff's Exhibit 4 and Plaintiff's Exhibit 3, and ask you to examine the same and point out such similarities and such differences as you find to exist between those two garments.

Mr. MILLER.—If your Honor please, we can do that just as well as the witness. Here are the physical things that we can look at and examine, and I do not think that we would gain any advantage by having the witness point out any similarities.

The COURT.—I think he may proceed briefly.

A. I find that this garment—

Mr. ACKER.—Q. Refer to the exhibit number.

(Testimony of Herbert Eloesser.)

A. Marked Plaintiff's Exhibit 3—is a one-piece peg-top, long leg play suit, with short outstanding sleeves, and a high waist effect, and the effect of a belt joining the waist onto [29—11] the trousers portion. I find on the back that the long leg peg-top effect and short sleeves are still in evidence, with the high waist, and opening down the back, and having a drop seat. This garment, No. 4, I find, is also a one-piece long leg peg-top play suit, with short outstanding sleeves; it also has a high waist effect, and the effect of a belt joining the waist to the trousers portion. It also has in the back the same high waist effect, the long peg-top trousers and the drop seat, and it opens down the back, and I consider that the garments are practically identical in design.

Mr. MILLER.—I move to strike out the last portion of the witness' answer, where he says he considers the garments are practically identical, as being a conclusion, and not a statement of fact.

The COURT.—That is an expert's statement. It may stand.

Mr. MILLER.—They do not allow experts in design patent cases.

The COURT.—If not material or competent, the Court will give it no consideration.

Mr. ACKER.—Q. I will ask you to compare Plaintiff's Exhibit 5 with Plaintiff's Exhibit 3, and state such similarities and such differences as you find to exist between said garments?

(Testimony of Herbert Eloesser.)

A. I have already examined and described Exhibit 3. Plaintiff's Exhibit 5 I find has the same peg-top long leg trousers portion, has the appearance of a high waist, and the effect of a belt, has square outstanding sleeves, and in the back I find that it has the same peg-top long leg trousers effect, the effect of a belt, it has a drop seat, it opens down the back, it has a square outstanding sleeve. These are the points of similarity. I find that the points of difference are that they have added a small red strip in the front, the same in the back, and I consider that in no way affects the design of the garment. [30—12] I notice that the belt is not stitched down in front, but I consider that that is unimportant in the design.

The COURT.—I think you have covered it.

Mr. ACKER.—I hand you another garment, Mr. Eloesser, and ask you to examine the same, and state if you can identify that garment, and if so what it relates to?

A. This is a garment that we have very reecntly made up for the purposes of this suit. It is identical with our design, except that we have placed on it a red strip of ornamentation that I have referred to in connection with my analysis of the last garment, Exhibit 5. It has the same features that I have described in our garment.

Q. And it is your garment?

A. It is our garment.

Q. With that strip added to it?

A. With that strip added to it.

(Testimony of Herbert Eloesser.)

Q. In your opinion, does the addition or the absence of that colored strip appearing at the front and back of the garment, make any difference as to the design of the play suit garment?

Mr. MLLER.—I object to that question as immaterial, irrelevant and incompetent, and calling for a matter of opinion, instead of a matter of fact. I think it is something to be ultimately determined by the Court.

The COURT.—He may answer; if not material, it will not be considered. The objection is overruled.

A. I consider the design identical, and I think it would not change the design in the least if we took the red strip off of it.

Mr. ACKER.—Q. Could you readily remove the strip from the garment?

A. I could.

Q. Please do so.

A. There it is. I could remove the other strips, but that is sufficient to illustrate it.

Mr. ACKER.—I will introduce this garment, and ask that the [31—13] same be marked Plaintiff's Exhibit 6.

Mr. MILLER.—I object to it as immaterial, irrelevant and incompetent, and as cutting no figure in the case.

Mr. ACKER.—It is just like the other.

The COURT.—He may introduce it. The objection is overruled.

(Testimony of Herbert Eloesser.)

Mr. MILLER.—It is not just like the other. There is a difference in that.

Mr. ACKER.—It is no different.

Mr. MILLER.—It is different in many material respects.

The COURT.—If counsel disagree, necessarily the Court will ultimately determine it.

(The document was marked Plaintiff's Exhibit 6.)

Mr. ACKER.—Q. Does this garment differ from your regular garments?

A. That is our regular garment, with these colored strips added to it.

Q. Do I understand you to testify that Mr. Kuh, of Kuh Bros., the defendant in the present action, advised you that it had discontinued, or intended to discontinue, or would discontinue the manufacture of defendant's first garment which has been introduced in evidence here?

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent.

The COURT.—He may answer; overruled.

A. Mr. Kuh did advise us that he had discontinued that.

Mr. ACKER.—Mr. Miller, you will admit, will you not, that written notice as to infringement was duly served upon the defendant?

Mr. MILLER.—No, I would like to have the notice, itself.

Mr. ACKER.—Do you wish to examine this

(Testimony of Herbert Eloesser.)

notice? Of course, the original is in the possession of the defendant.

Mr. MILLER.—I have no objection to the copy. You can [32—14] offer it in evidence.

Mr. ACKER.—I offer in evidence a carbon copy of notification of infringement of the defendant, and ask that the same be marked Plaintiff's Exhibit 7.

Mr. MILLER.—What is the date of that?

Mr. ACKER.—April 8, 1921.

(The document was marked Plaintiff's Exhibit 7.)

Q. Have you changed, altered, or varied the design of your garment since acquiring title to the letters patent in suit? A. No, we have not.

Mr. MILLER.—That is objected to as immaterial, irrelevant and incompetent.

The COURT.—The objection will be overruled. If not material it will not be considered.

Mr. ACKER.—Q. You testified that you commenced the manufacture of this design garment of the letters patent in suit during the year 1919, and I will ask you to state how the sales of the garments as placed on the market by your company during the year 1920 compared with the sales of the garment during the year 1919?

A. I have a memorandum, if I may refer to that, of the sales.

Q. That will save time.

A. In 1919 we sold 17,176 garments, in 1920 we

(Testimony of Herbert Eloesser.)

sold 32,760 garments. In 1921 we sold 134,748 garments, and in 1922 we sold 176,640 garments.

Q. How do you account, if at all, for the rapid increase in sales of this garment?

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent. He has given the fact now, and anything he would say would be merely his opinion.

The COURT.—Oh, yes. Leave it to the Court to infer a public demand for it. [33—15]

Mr. ACKER.—Has your company been required to increase its manufacturing plant in any manner whatsoever in order to take care of the increased volume of trade with reference to the manufacture of the design garment in suit?

Mr. MILLER.—That is objected to as irrelevant.

The COURT.—I think so. If you have a valid patent, what is the difference how much he has manufactured, or how little; if defendant infringes it it will be enjoined.

Mr. ACKER.—According to a number of decisions, it is material, we think.

The COURT.—Let him answer. The objection is overruled.

A. We have made considerable increases in our plant which was not nearly adequate to take care of the additional and especially large increase from 1920 to 1921, which outran our capacity, and we spent considerable sums of money in enlarging our plant to take care of the additional demand and provide for future growth.

Mr. ACKER.—Q. What effect, if at all, has the manufacture and sale of the claimed infringing garments placed on the market by Kuh Bros., the defendant in the present case, had in reference to the sales of the design garment placed on the market by your house?

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent.

Mr. ACKER.—I think, if your Honor please, it bears on the question as to confusion in the trade, as to whether or not one article has been accepted by the trade generally as the equivalent of the other.

The COURT.—Go to something specific. The objection to the present question will be sustained. Go to the specific matter [34—16] you mentioned.

Mr. ACKER.—Please state whether or not the design garment placed on the market by the defendant has caused confusion in the trade with respect to the design garment which was placed on the market by your house?

Mr. MILLER.—Objected to as immaterial irrelevant and incompetent, and further as calling for the opinion of the witness. If you have got any man who was ever confused, let him go on the stand and testify to it, but this man's testimony must necessarily be based on hearsay, or upon opinion.

The COURT.—He may answer; the objection is overruled.

(Testimony of Herbert Eloesser.)

A. We have had agents who covered a very large territory, and we find the greatest amount of trouble in selling our garments as our customers find that they can buy this infringing garment at a lesser price, and they tell us it is the same thing, and they do not see why they should have to pay more money for our garment.

Mr. MILLER.—I move to strike out the answer on the ground it is hearsay.

The COURT.—Overruled. The motion is denied.

Mr. ACKER.—No further direct examination.

Cross-examination.

Mr. MILLER.—Q. Is there a distinction in the trade between a romper and a play suit?

A. I do not believe there is any absolute distinction, Mr. Miller.

Q. I ask that, because you have testified here to play suits, using the term "play suits." Why did you use that instead of the word "romper"?

A. Previously, Mr. Miller, the word "romper" was used more extensively, because the play suit was quite new. More recently there has come to be some distinction, but a great many people do not recognize that, and so there [35—17] is more or less confusion between the two terms, "play suits" and "rompers."

Q. I ask you that because your patent calls for a romper, does not mention play suit at all. Why did you put that in the patent? Why was that put in the patent?

(Testimony of Herbert Eloesser.)

Mr. ACKER.—This witness did not put it in the patent. It was a patent acquired from others.

Mr. MILLER.—Q. Why is the word "romper" put in the patent instead of "play suit"?

The COURT.—If you know.

A. I think the patent was drawn up by an attorney, and that attorney did not understand the difference between the terms, because they are very nearly synonymous.

Mr. MILLER.—Q. He made a mistake in calling it a romper instead of a play suit, did he?

A. I would not say that it was a mistake, but I should say that the play suit was a more up-to-date description.

Q. Now, as a man skilled in this art, don't you know, yourself, as well as anybody else knows, and as well as I know, what a romper is in the art?

A. I should think I know as well as you do, Mr. Miller.

Q. Isn't it a short-legged garment, not a long-legged garment?

A. I think that there is considerable confusion in the minds of people on that score to-day.

Q. I will show you a garment, and ask you isn't that what is known as a romper?

A. I would call that a romper, yes.

Q. It has not got the long legs, like your garment, has it? A. No.

Q. That is a fair sample of a romper?

A. I think that may be called a romper.

Q. That would not be called a play suit, would it?

(Testimony of Herbert Eloesser.)

A. It might be called a play suit. [36—18]

Q. Would you call it a play suit?

A. I would be more likely to use the other term, but I would not be surprised if merely asking for a play suit that was what was meant.

Q. Being skilled in this art, you would know more about how to call this?

A. Probably as an expert I might call that a romper, as distinguished from a play suit.

Q. You would know instantly that was a romper, wouldn't you, as soon as it was handed you?

A. Yes.

Q. Where did you say this Exhibit 4 came from? where you got it?

A. That, Mr. Miller, is the garment that Mr. Kuh brought to me personally.

The COURT.—You have not got them labeled right, then. That is something you testified you bought in the open market. Exhibit 5 is the one you said Mr. Kuh gave you. I think there is a little confusion on that.

The COURT.—There may be. Straighten it out.

Mr. MILLER.—Take these garments and straighten them out, and then get them all marked correctly, because I misunderstood.

A. Exhibit 5, which I have in my hand, is the garment that we bought in the open market.

The COURT.—Very well.

A. Exhibit No. 4 is the garment that Mr. Kuh, himself, brought to me, the one I have in my hand.

(Testimony of Herbert Eloesser.)

The COURT.—Very well; that is straightened out now.

Mr. MILLER.—Q. When did Mr. Kuh bring you this garment, Exhibit No. 4?

A. Do you want the date, Mr. Miller?

Q. Yes.

A. I should say it was some time, as nearly as I remember, in March, 1921.

Q. What occurred between you and Mr. Kuh when he brought you this garment?

A. Mr. Kuh, when he brought us that garment, said that he was willing to recognize the patent, and that he wanted [37—19] to get out from the manufacture of an infringement without any loss, and that he would like to have us take these articles off his hands.

Q. And you agreed to take them off his hands, didn't you? A. We did not.

Q. You first agreed to take them off his hands?

A. We did not at any time agree unconditionally to take them off his hands.

Q. Mr. Kuh brought you this sample and said that was the stuff that he had been making, and he was willing to stop making that garment if you would take off his hands the garments that he had then; didn't he say that?

A. Mr. Kuh said that he would like to have us take these garments off his hands, in order to avoid having a loss if he did abstain from infringement of the patent in suit.

(Testimony of Herbert Eloesser.)

Q. And you agreed to do that for him, didn't you? A. I did not.

Q. You did at first, didn't you?

A. I did not at any time, Mr. Miller, unconditionally.

Q. What did you say to him?

A. I said to him that if he would agree not to make any more infringing garments, we would then make an arrangement to take these garments off his hands for him.

Q. What did Mr. Kuh do with the garments after that? A. Mr. Kuh, I understand, sold them.

Q. Don't you know as a fact afterwards Mr. Kuh took all of these garments that he had in his possession and changed them to straight-legged, instead of the peg-legged, and sold them in that way?

A. I don't know that; I understood to the contrary, that he had sold them.

Q. Don't you know, as a matter of fact, after Mr. Kuh was not able to make any arrangements with you he took over these garments and cut off the peg legs, and made straight-legged garments, just exactly like a Koverall, and then sold them in that [38—20] shape?

A. I don't know that; I understood to the contrary, that he sold the garments in that shape, as they are.

Q. I would be glad to inform you to the contrary when our evidence comes in. Now, you compared the Kuh garment, No 5, with your garment, No. 3. Do you find that your garment has the square Dutch

(Testimony of Herbert Eloesser.)

neck, or what is a square neck that is generally known as the Dutch neck?

A. I would say that our garment has what is commonly known as a square neck, although it does not look very square.

Q. Doesn't that look practically square?

A. No, not to me.

Q. How does it look, then?

A. It looks approximately square, as an operator would manufacture it.

Q. Look at your patent and tell me what kind of a neck you have; you have it there, look at your patent and tell me what kind of a neck you have there.

A. The patent would indicate a square neck.

Q. That is what is known as an ordinary square, Dutch neck, is it not? A. I belive so.

Q. Don't you mean to say you are following your patent when you are making your own garments?

A. We are following it very closely.

Q. Then you are endeavoring to make a square Dutch neck, aren't you? A. We endeavored to.

Q. You do not quite succeed, though, do you?

A. We do not quite succeed, no.

Q. Now, then, in the defendant's garment, do you find any square neck?

A. I find his neck is a round neck.

Q. So that whereas your patent calls for an absolutely square neck in these devices you have made a round neck: That is a difference in that respect, is it not?

(Testimony of Herbert Eloesser.)

A. Well, you might possibly consider that a difference. [39—21]

Q. Will you please answer my question: I am asking, as a matter of fact, whether you find that difference between the two garments?

A. Yes, I find that difference.

Q. You also find in your garment that you have a short sleeve, with no binding on the edge and no binding in between, so as to form a cuff.

Q. You find that difference, don't you?

A. Yes.

Q. That is known as a piping in the art, is it not?

A. I do not think that is a piping.

Q. Anyway, it is a cuff?

A. We will call it a trimming.

Q. Your garment has no cuff?

A. I would not call that a cuff. I would call it a trimming on the end of the sleeve.

Q. Your garment has no cuff? A. No.

Q. Nor cuff bottom? A. It has no cuff bottom.

Q. Your garment also has what is known as patch pockets, that is to say, they are pockets just as shown in your patent drawings? A. Yes.

Q. Has this garment of the defendant any patch pocket? A. It certainly has.

Q. Where is the patch?

A. The patch is on the inside.

Q. The pocket in this case is made as a part of the peg-top, right there.

A. Any expert will tell you that is a patch pocket.

Q. I won't get into any controversy. The pocket

(Testimony of Herbert Eloesser.)

in the defendant's garment is formed inside of the peg-top, itself, is it not?

Q. And the pocket in your garment is not formed in that way, but is formed away from the peg, and with a curve, and on the side of the garment, itself?

A. Yes.

The COURT.—The patch is sewed on the outside?

A. Yes, our patch is sewed on the outside.

Mr. MILLER.—Q. That is the way it is shown in the patent, is it not. A. I should say so. [40—22]

Q. Now, in this garment, Exhibit 5, you find this yoke effect, consisting of a red binding that goes up toward the neck of the garment, would you not?

A. I would not call it a yoke effect.

Q. What do you call it?

A. I would call it some red trimming.

Q. Do you find that on this, whatever you call it?

A. No.

Q. It is not in your patent at all, is it?

A. It is not in that position in our patent.

Q. You find also that same trimming in the form of a yoke on the back of the defendant's garment, do you not? A. I find trimming on the back.

Q. That is substantially the same as it is on the front, is it not?

A. I think you have the back and front confused; this is the back.

Q. Then on the front, you find it also? A. Yes.

Q. You find also on the defendant's garment a belt that can be buttoned or unbuttoned, as the case requires, do you not? A. Yes.

(Testimony of Herbert Eloesser.)

Q. Do you find any such belt on this?

A. I find the effect of a belt.

Q. What do you mean by the effect of a belt?

A. A thing that looks like a belt from a distance.

Q. That is simply a piece of goods stitched in there so as to connect the upper and lower parts of it together?

A. A band that is put across the front and has the effect of a belt.

Q. Just a binding that is as old as the hills in children's garments: That is all it is, is it not—a straight band right across, that is what it is?

A. You ask me if it is as old as the hills?

Q. Isn't a band a very old device?

A. Every element of that is old; it is merely the arrangement of them that I consider novel. [41—23]

Q. You find no belt on this, at all?

A. I do find a belt.

Q. You mean you find this band? Do you call that a belt? A. I call that a belt.

Q. Does it button over?

A. It does not button.

Q. It is stitched in there permanently, is it not?

A. It is stitched in permanently.

Q. You spoke something about a drop seat: Is that in your garment, too? A. Yes.

Q. Where is it in the patent?

A. I should say that it is right here.

Q. It is not shown in the patent at all, is it?

(Testimony of Herbert Eloesser.)

A. I should say it is probably included in the patent.

Q. How is it indicated?

A. It is indicated by the fact that there are buttons across there; it may be presumed that is going to drop down.

Q. That is what might be presumed, but it is not shown in the patent?

A. I should say it is shown as clearly as could be shown in a black and white illustration.

Q. Do you think this garment of yours is a very aesthetic, ornamental thing?

A. I think it is very aesthetic and ornamental.

Mr. MILLER.—That is all.

The COURT.—Any redirect examination?

Mr. ACKER.—I omitted to introduce in evidence an exhibit, if your Honor please. If you have no objection, Mr. Miller, I will put it in now.

Mr. MILLER.—If it is material, I have no objection. I do not object to the time you are offering it.

The COURT.—Offer your exhibit.

Mr. ACKER.—Q. Mr. Eloesser, please examine these photographs I hand you and see if you can identify them, and, if so, what they are?

A. This first one, Mr. Acker, is a picture of a model [42—24] which I had taken a few days ago of the garment that we have submitted in evidence here, as I believe, Exhibit No 3, Eloesser-Heyenmann Co. garment.

(Testimony of Herbert Eloesser.)

This next picture is the same model, except manufactured by Kuh Bros., which I purchased in the open market, I believe it is Exhibit No. 5. This is a back view of the same model dressed in the same Eloesser-Heynemann Co. garment, and this is the back view of the same model dressed in the Kuh Bros. garment.

Q. Were those photographs taken under your personal supervision? A. Yes.

Mr. MILLER.—I object to these photographs as immaterial, irrelevant and incompetent; it seems that the witness, or somebody under him, has gone to work and dressed up a child to suit themselves, and evidently they have been posed, and the garments arranged to make them as near similar as possible, all of which was done outside of our presence, and I think that the photographs are immaterial.

The COURT.—Overruled.

Mr. ACKER.—I offer these in evidence, and ask that the same be marked as Plaintiff's Exhibit 8.

(The photographs were marked Plaintiff's Exhibit 8.)

Q. You have used the expression "play suit" in your testimony, and you were questioned by counsel under cross-examination with reference thereto. Please state whether or not that has become a term utilized in the trade to designate this type of garment?

A. It has become a term, Mr. Acker, which is not entirely accepted, yet, but it is rapidly becoming so.

(Testimony of May White.)

Q. And goods are so ordered, under that name?

A. Yes.

The COURT.—Call your next witness. [43—25]

Testimony of May White, for Plaintiff.

MAY WHITE, called for the plaintiff, sworn.

Mr. ACKER.—Q. Please state your residence and occupation?

A. 2331 Telegraph Avenue, Oakland, California, buyer at Upright's Store, in Oakland.

Q. What department of Upright & Company in Oakland are you the buyer of?

A. I have several departments, the Baby Department, Women's Ready-to-wear, including all of the outer garments except suits, coats and hats.

Q. Does the department of which you are buyer of Upright & Company handle what are known as play suits? A. They do.

Q. Can you describe the style or design of the play suits which are handled by your department, purchased by you for Upright & Company as buyers?

A. We handle several play suits, because we call most any garment that the kiddies play in play-suits. The only one we do not call a play suit is Levi Strauss' Koverall.

Q. Are you familiar with the play suit which was manufactured and placed on the market by Kuh Bros., of San Francisco, and also the play suit which is manufactured and placed on the market by Eloesser-Heynemann? A. I am.

(Testimony of May White.)

Q. Do you handle those designs of play suits in your department of Upright & Company?

A. I handle both of them.

Q. And to which play suit do you give preference if at all in the placing of your orders for play suits?

A. I buy more of Kuh Bros. play suits, because they are a little cheaper, and, naturally, working for the interest of the department, I must buy the one that costs less money to buy.

Q. Do these play suits which have been introduced in evidence, Plaintiff's Exhibit 3 and Plaintiff's Exhibit 5, represent the play suits which you have testified about as being purchased [44—26]

A. They do.

Q. From your experience in selling these children's play suits, would, in your opinion, customers who came to purchase from your establishment play suits to match the plaintiff's design, if shown the defendant's design of play suit, believe that it was a designed garment similar to that of the plaintiff's?

A. They would.

Mr. MILLER.—That question is objected to as immaterial, irrelevant and incompetent, and calling for the opinion of the witness on a matter concerning which the opinion is not proper. The rule is, you cannot call an expert and ask him his opinion as to whether one would be mistaken for the other.

The COURT.—I think she may answer, but if not material the Court will give it no consideration.

Mr. ACKER.—Q. As a buyer for Upright &

(Testimony of May White.)

Company, please state whether or not in your opinion those two play suits represent the same design garment?

Mr. MILLER.—I object to the question, if your Honor please, as immaterial, irrelevant and incompetent, and as calling for an expert opinion, where an expert opinion is not competent or proper.

The COURT.—She may answer. If not competent, the Court will give it no consideration. The objection is overruled, and an exception may be noted.

Mr. MILLER.—We save the point.

A. I can only speak from the amount of orders that I, myself, placed on play suits. I bought the Kuh garments simply because they were peg-topped, and that was all they would ask for when they wanted these garments. It does not make any [45—27] difference to the department as to the trim of the garment, that is all they ask for, peg-top, they did not ask anything about the belt, or anything, and I bought them just because they were peg-topped, and I bought the cheaper ones, because it would show better if I paid less money for the garment for the department.

Mr. ACKER.—Q. In the placing of these garments on display in your department, did you make any difference as to the arrangement of the garment, that is to say, were they all placed together, or kept separate?

Mr. MILLER.—Objected to on the same grounds as the preceding question was objected to.

(Testimony of May White.)

The COURT.—She may answer; overruled.

Mr. MILLER.—Exception.

A. The garments were kept all together, according to the sizes; if they ask for a peg-top, we naturally show a cheaper garment; if they want them by name, we show them whatever they ask for, such as the Kute Kut.

Mr. ACKER.—Q. That is to say, if they ask for a Kute Kut garment, they are shown the garment of Eloesser-Heynemann Co.?

A. Yes, and if they ask for the peg-top we naturally show the cheaper garment.

Q. Why is it, if you can buy the product of Kuh Bros. at lower figures than you can purchase from Eloesser-Heynemann Co., that you carry the Eloesser-Heynemann garment at all?

A. Because if they ask for a Kute Kut, we want them in stock. We do not want to say that we have not got them, the same way as we carry Koveralls and play suits, if they ask for a Koverall, we give it to them.

Q. In your opinion, does the fact that the play suit garments of Kuh Bros. disclose the colored stripes on the waist and on [46—28] the sleeves make it a different designed garment from that of Eloesser-Heynemann Company?

Mr MILLER.—Objected to as immaterial, irrelevant and incompetent, and not calling for a fact, but for an opinion concerning which the witness is not competent to testify.

(Testimony of May White.)

The COURT.—She may answer; if not material the Court will give it no consideration.

Mr. MILLER.—Exception.

A. No; the trimming would have nothing to do with it, they look alike.

Mr. ACKER.—That is all.

Cross-examination.

Mr. MILLER.—Q. What is the trade name of Eloesser-Heynemann garments, the trademark?

A. Kute Kut.

Q. It is Kute Kut, is it? A. Yes.

Q. Is that on the garment, itself? Just look and see. A. It usually is on those that we buy.

Q. Those that you buy have a ticket, a white ticket, with the trademark "Kute Kut" on it, and a little picture of a garment?

A. Of a peg-top garment.

Q. And all that you sell have that on it, haven't they? All of these garments that you sell for Eloesser-Heynemann Company have that on it?

A. If the garment comes from there, yes, I believe it would have.

Q. This garment that has been put in evidence here as Exhibit No. 3 leaves off that trademark, does it? A. I have never really noticed.

Q. I am speaking of this garment here; there is no trademark on this garment at all, is there?

A. I do not see it.

Q. Now, if a person came into your store and said they wanted a Kute Kut garment, what would you hand them out? [47—29]

(Testimony of May White.)

A. I would hand them out a little peg-top Kute Kut bought from Eloesser-Heynemann.

Q. You would not think of handing them out the garment that you were selling for Kuh Bros.?

A. No, because you have a different name there.

Q. By what name is the Kuh Bros. garment sold?

A. "Jim Dandy."

Q. Is that shown there, too? A. Yes.

Q. So that when anybody comes in and asks for Kuh Bros. Jim Dandy garment, you would not think of handing them Eloesser-Heynemann's?

A. I have never had anybody ask me for Jim Dandy; they usually ask for a peg-top.

Q. Suppose a person came in to you and asked for a Kute Kut garment, what would you hand them?

A. The peg-top, but I would give them the garment with the Kute Kut name on it.

Q. The term "Kute Kut" is connected with Eloesser-Heynemann's firm, is it not, in the trade?

A. I could not say.

Q. If a person came and asked for "Kute Kut" you would hand him out that garment? A. Yes.

Q. The name "Jim Dandy" is connected with Kuh Bros.? A. Yes.

Q. If any purchaser came in and asked you for Jim Dandy, you would hand him a Jim Dandy garment?

A. I certainly would give the one that had the name on it.

(Testimony of May White.)

Q. You would not try to defraud a person by passing off one of these garments for them?

A. No.

Q. But you would try to give each person what he wanted, would you not? A. Yes.

Q. Now, then, the majority of the people coming in there ask you for a peg-top play suit?

A. Yes, they want the peg-top.

Q. When they ask you for a peg-top play suit, what do you hand them?

A. You understand that this is only speaking for the department. If they ask for a peg-top, the cheaper garment is [48—30] shown, because, as I say, it costs less money, and we sell that garment more than this.

Q. You would not try to defraud anybody?

A. No.

Q. They just simply ask you for a peg-top garment, and because this garment has a peg top you conclude that that answers the requirements of the purchaser, and you hand him out that garment?

A. No, only because there is a better profit shown on the cheaper garment. That is why they hand it out.

Q. That answers the purchaser's requirements, does it not, of a peg top?

A. It is just the same, because they are the only garments that have the peg-top.

Q. Peg-top garments have been known for many years, have they not?

(Testimony of May White.)

A. I have never seen the long-legged peg-top before this.

Q. You have seen short-legged peg-tops, have you not? A. The little wash suits, yes.

Q. What is the difference between a play suit and a romper?

A. It is only of late that we call these play suits, as far as my experience goes. Formerly, we called all of them Koveralls, but we were notified not to do so, so we called them play suits.

Q. You mean you called rompers play suits?

A. We did not call rompers play suits.

Q. You called rompers by their own name of rompers, did you not?

A. It all depends on what you call a romper; but the public may come in and ask for something for the kiddies to play in, rompers, play suits, or anything.

Q. That is, there is a distinction in the trade between rompers and play suits?

A. Sometimes they ask for the thing which isn't what we think it is.

Q. There is a distinction in your mind?

A. Yes, there is in my own mind.

Q. Between rompers and play suits?

A. In my own mind, yes. [49—31]

Mr. MILLER.—That is all.

Redirect Examination.

Mr. ACKER.—Q. You stated on cross-examination that customers now and then ask for these play suits under the name Kute Kut? A. Yes.

(Testimony of James B. Mullen.)

Q. Have you ever had anyone come into your store and ask for this play suit under the name Jim Dandy? A. Never in my life.

Testimony of James Mullen, for Plaintiff.

JAMES B. MULLEN, called for the plaintiff, sworn.

Mr. ACKER. Q. What is your age, residence and occupation?

A. 43; I reside in Fresno, California; I have a small jobbing house of men's furnishing goods. Besides that, I have traveled and represented Eloesser-Heynemann Co. in the San Joaquin Valley.

Q. What territory did you cover?

A. From Tracy to Bakersfield.

Q. Are you familiar with the garments that are involved in the present controversy? A. I am.

Q. That is you are familiar with Kuh Bros. and Eloesser-Heynemann Company's garments?

A. Yes.

Q. I understood you to state that you sold within your territory the play suit product of Eloesser-Heynemann Co.? A. I did.

Q. Please state whether or not you have experienced any difficulty with reference to the sale of play suits within your territory by reason of the play suits manufactured and sold and placed on the market by Kuh Bros. the defendant in the present case? A. I have had.

Q. Please name some concerns.

(Testimony of James B. Mullen.)

A. George B. Sshaeffer Co., Modesto, Kuttner-Goldstein, Madera, Radin & Kamp, of Fresno, Sweet Co., of Visalia.

Q. What do you mean by you have had difficulty with these parties in connection with the sale of the Eloesser-Heynemann [50—32] product?

A. They could buy the Kuh garment considerably cheaper, and it takes the place of our garment.

Q. What do you mean by that "it takes the place of our garment"?

A. They make things so identical that they do not see the difference in it, and will accept it in place of the Kute Kut.

Mr. MILLER.—I move to strike that out.

The COURT.—I think it may stand in the record. The motion will be denied.

Mr. MILLER.—Exception.

Mr. ACKER.—Q. Have any of your customers expressed to you the opinion that the garments were the same?

Mr. MILLER.—I object to that as calling for hearsay testimony.

The COURT.—Sustained.

Mr. ACKER.—Q. Has the placing on the market of the play suit by Kuh Bros. affected the sale in your territory, by you of the play suit of Eloesser-Heynemann Company?

Mr. MILLER.—I object to that as calling for the opinion of the witness by deduction instead of giving us the facts.

The COURT.—The objection is sustained.

Mr. ACKER.—Q. I hand you a series of photographs, and ask you to examine the same and state whether or not in your opinion the photographs disclose the same design play suits?

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent. We are not sued on a photograph, we are sued on a patent.

The COURT.—Sustained.

Mr. ACKER.—Q. Please examine the two exhibits, Plaintiff's Exhibit 3 and Plaintiff's Exhibit 5, and state whether or not, in your opinion, as one conversant with this line of merchandise, they display the same design garment?

Mr. MILLER.—I object to that as calling for the conclusion [51—33] of the witness, and not the proper kind of testimony to be given as to whether designs are the same.

The COURT.—Have you any authority for it?

Mr. ACKER.—I think we have authority, your Honor, that the garments should be compared side by side and express an opinion as to whether or not they display the same design.

The COURT.—I would like to see the authorities.

Mr. ACKER.—I think I can give you those after the recess hour.

The COURT.—I would imagine in a case of this importance you would come in fully prepared to meet the issue.

Mr. ACKER.—We are fully prepared on the law, but not on that particular point. I withdraw the question.

(Testimony of Paul Heynemann)

Q. Would, in your opinion, the fact that there is a colored strip or a colored ornamentation applied to the defendant's garment differentiate it from the design garment of the plaintiff's manufacture?

Mr. MILLER.—I object to that as calling for purely an opinion of this witness.

The COURT.—It goes right back to the same question.

Mr. ACKER.—I withdraw the question. Take the witness.

Mr. MILLER.—I have no questions.

Testimony of Paul Heynemann, for Plaintiff.

PAUL HEYNEMANN, called for the plaintiff, sworn.

Mr. ACKER.—Q. Please state your age, residence and occupation?

A. 2721 Clay Street residence; occupation, I am in charge of sales of Eloesser-Heynemann Company.

Q. How long have you been acting in the capacity of salesman or head salesman of Eloesser-Heynemann Company?

A. Just about a year and a half, that I have held the title, although I have [52—34] been connected with the sales department for about four years.

Q. You are familiar with the two garments involved in the present controversy, are you not?

A. I am.

Q. Have you visited the various stores in the city

(Testimony of Paul Heynemann.)

and county of San Francisco, and noted how the play suit garments are displayed in the stores?

Mr. MILLER.—I object to that as immaterial and irrelevant.

The COURT.—That is merely preliminary. I think he may answer.

A. I have visited some stores.

Mr. ACKER.—Q. Are they prominent stores of this city?

A. Yes. I have visited stores like O'Connor-Moffatt, Marks Bros., and Magnin's.

Q. How are the goods displayed in those stores which you have referred to?

Mr. MILLER.—I object to the question as immaterial, irrelevant and incompetent.

The COURT.—He may answer. The objection is overruled.

Mr. MILLER.—Exception.

A. Ordinarily, they are displayed by piling them on shelves; once in a while on counter display, with a suit on a model, and once in a while also in the windows on models, or draped over special racks.

Mr. ACKER.—Q. Is there any distinction made in the houses where you have noted the products of the defendant and the plaintiff on sale, as to how these goods are offered for sale, I mean kept separate and distinct? A. No.

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent, for the reasons heretofore stated.

(Testimony of Paul Heynemann.)

The COURT.—The objection is overruled. [53—35]

Mr. MILLER.—Exception.

A. There is no distinction. The garments of our manufacture and those of Kuh Bros. are piled together. According to my experience, the first one that happens to be on top is handed out to the customer, who comes in the store.

Mr. ACKER.—Q. That is, if it happened to be the proper age and size?

A. If they happen to be of the proper age and size; they are arranged by sizes invariably.

Q. Can you state whether or not there has been any diminution in the sales of Eloesser-Heynemann Co., by reason of the manufacture and sale by Kuh Bros. of the claimed infringing garment?

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent, and further as not calling for the best evidence; this is only a salesman, and he is not presumed to know from the books of the company if the sales have been reduced.

The COURT.—The objection is sustained.

Mr. ACKER.—Q. How are these suits usually designated in the trade?

A. They are designated as the peg-top child's garment, with long legs, high waist.

Q. Are they known as a one-piece garment?

A. One-piece garment, yes.

Q. Are these garments made for use of boys or for the use of girls?

(Testimony of Paul Heynemann.)

A. Primarily for the use of girls.

Q. And they were gotten up for that purpose?

A. They were gotten up for that purpose, that was our original plan.

Q. Did your house ever manufacture a play suit adapted for girls prior to the taking on of the manufacture of the play suit of the letters patent in suit?

A. Not during my connection with the firm.

Q. Your connection has extended for what period of time? [54—36]

A. For about four years or a little over.

Q. Have you ever, as the head salesman of Eloesser-Heynemann Co., received any orders from outside territory wherein they have cancelled orders for the play suit of Eloesser-Heynemann Company by reason of the fact that they could purchase the same suit from Kuh Bros. at a less price? A. Yes, I have.

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent, and as also calling for secondary evidence.

The COURT.—The objection will be overruled, he may answer. If not entitled to any consideration, none will be given to it.

A. Yes, we have.

Mr. ACKER.—Q. From whom?

A. I remember one instance of one of our salesmen in Southern California, by the name of Walburn.

Q. Explain a little more fully.

(Testimony of Paul Heynemann.)

A. In this particular case we received an order, or a copy of an order, in which certain items which had been ordered from us were scratched out, and there was a notation on the bottom by our salesman, Mr. Walburn, saying that those items should be eliminated, because they could obtain for a less price, the same garment, and he mentioned the lot and price of Kuh Bros. illustrating definitely that they could get the same garment for a less price, and, therefore, we should not ship those particular items.

Mr. MILLER.—I move to strike out the answer as immaterial, irrelevant and incompetent, calling for secondary evidence.

The COURT.—I am rather inclined to agree with you, but we will let it stand. The motion is denied.

Mr. MILLER.—Exception.

Mr. ACKER.—That is all. [55—37]

Cross-examination.

Mr. MILLER.—Q. What is the trademark of Eloesser-Heynemann Company, as applied to these peg-top, long-leg play suits?

A. "Kute Kut."

Q. How is that trademark applied to the garment?

A. There is a cloth label on the garment, and that name is printed on the cloth label.

Q. That cloth label is sewed on to the garment?

A. Yes.

Q. Is there any such trademark shown on this

(Testimony of Paul Heynemann.)

garment which has been put in evidence here as Exhibit 3?

A. There is no such label.

Q. Why is the label left off of this one?

A. I am sure I do not know.

Mr. MILLER.—That is all.

The COURT.—Call your next witness, if any.

Mr. ACKER.—Mr. Miller, this label has not been left off; it has been accidentally misplaced, and it is in the pocket of the garment; as it was handled, it has been torn off; in other words, it has not been intentionally removed; it was torn off and put in the pocket. That is all.

The COURT.—Is that your case?

Mr. ACKER.—Yes.

Mr. MILLER.—If that is the label that goes with them, it is not the label described by the witness at all. I want you to produce one of the labels with the name Kute Kut on it that is attached to your various garments?

Mr. ACKER.—There it is.

Mr. MILLER.—Do I understand you to say that this is the label that is attached?

Mr. ACKER.—There it is. That is the way they are arranged, and that is the way they are attached. [56—38]

Mr. MILLER.—Very well, I will offer this in evidence.

Mr. ACKER.—I will pin it to the garment.

The COURT.—One of your witnesses ought to know where they put that label. It ought to be put on there if you produce it as a facsimile.

(Testimony of H. Garfinkel.)

Mr. ACKER.—It shows in one of the photographs.

The COURT.—All right.

Testimony of H. Garfinkel, for Plaintiff.

H. GARFINKEL, called for the defendant, sworn.

Mr. MILLER.—Q. Mr. Garfinkel, what is your business?

A. At the present time in the retail business.

Q. Have you ever been in the business of manufacturing these play suits? A. Yes.

Q. When did you commence in that?

A. In the city, here, on Market street, 585 Market street.

Q. How long ago was that?

A. Well, probably, let me see, about three years, I guess.

Q. Was it before Miller & Macowsky began manufacturing their garments?

A. I originally got a sample of the Miller & Macowsky garment, there was a salesman that came up to sell me some denims, and he brought up a sample that Miller & Macowsky made up.

Q. What kind of a sample?

A. A garment with a peg top, similar to the Kute Kut.

Q. Was it the Kute Kut? A. Not at that time.

Q. What was its name?

A. I named it the Micky.

Q. You mean the garment which you got up?

A. Yes.

(Testimony of H. Garfinkel.)

Q. Did you sell your garment under the name of the Micky? A. The Micky, yes.

Q. I will hand you a garment now and ask you what this garment is?

A. This garment is not my Micky. After I went out of business [57—39] I told Mr. Feiesel, that was connected with the baby shop, that since I was going out of business it would probably be advisable for him to make these garments up. I told him that name belongs to me, that he could use the word Micky, and he registered the name for his own protection.

Q. Was that a garment that you made?

A. The original garment that I made up and sold to department stores; in fact, I was the first one to put them on the market in quantities, a garment similar to this.

Q. When did you put these garments on the market?

A. Well, I could not exactly say the exact date, approximately, I guess it was—when was the armistice signed, in 1917 or 1918?

The COURT.—November, 1918.

A. That is right, approximately around that time.

Mr. MILLER.—Q. About what time did you go out of business?

A. Say about seven or eight months after that.

Q. Then you sold out to the Art Shop?

A. No, the Art Shop was mine; I sold out to Spiecski, manufacturers of ladies' dresses.

Q. I will show you a bill here and ask you if you

(Testimony of H. Garfinkel.)

can recognize what that bill is, and what it represents?

A. 24 dozen Mickys at $9.50 a dozen.

Q. To whom did you sell those?

A. E. J. Feisel.

Q. That is the bill for them?

A. That is the bill for them.

Q. What was the date of the bill? A. April 23.

Q. What year? A. 1919.

Q. Were those Micky garments similar to the one that you hold in your hand now? A. Yes.

Mr. MILLER.—We offer this garment in evidence and ask that it be marked Defendant's Exhibit "A," Micky.

(The garment was here marked Defendant's Exhibit "A," Micky.) [58—40]

We also offer in evidence the bill that has been identified by the witness, dated April 23, 1919, calling for 24 dozen play suits, Micky, $228, and ask that it be marked Defendant's Exhibit "B."

Q. I show you another bill and ask you what that represents?

A. That is the same thing, Micky.

Q. That is dated what? A. April 24, 1919.

Q. And calls for how many Micky play suits?

A. One dozen.

Q. That is at $9.50? A. Yes.

Mr. MILLER.—I offer this in evidence, and ask that it be marked Defendant's Exhibit "C."

Q. What is this paper which I now hand you?

A. I presume it is the same class of goods.

Q. What is the paper, an order?

(Testimony of H. Garfinkel.)

A. It is an order, yes.

Q. For these goods? A. Yes.

Q. Was this order turned in to you?

A. Turned in to me.

Q. To your company? A. Yes.

Q. And in pursuance of that order you furnished the goods of which these bills are evidence?

A. I don't know where that entire order was delivered. That was an order, but whether that particular order was delivered, or not, I am not in position to tell you right now.

Q. What kind of goods was this order?

A. The very same goods.

Q. Micky play suits? A. Yes.

Q. What is the date of it? A. April 10, 1919.

Q. That is about the time that you received the order for these goods?

A. Approximately, I suppose; it reads that way.

Mr. MILLER.—We offer this in evidence, and ask that it be marked Defendant's Exhibit "D."

(The document was marked Defendant's Exhibit "D.")

Q. Prior to receiving this order last mentioned from Mr. Feisel, [59—41] had you manufactured any of these Micky play suits?

A. Oh, yes, we made up stock.

Q. About how much of a stock did you have?

A. I could not tell you right now; we probably made up a hundred dozen or so.

Q. Had you sold any of that stock to anybody else?

(Testimony of H. Garfinkel.)

A. Yes, we sold them to the Emporium and to other people.

Q. And this order from Feisel you received on the 10th of April? A. Yes.

Q. And you filled that order, did you?

A. I don't know. The other bills would probably explain that. That is part of the order. The order was given on the 10th of the month, and the bill reads on the 19th, so that must have been a part of the order that was delivered on the 19th.

Mr. MILLER.—That is all.

Cross-examination.

Mr. ACKER.—Q. This garment you manufactured under the name of Micky was copied from the play suit of Miller & Macowsky?

A. Yes.

Mr. MILLER.—Q. Did Miller & Macowsky have any goods on the market at that time?

A. I am not in a position to say; I do not think so.

Q. What makes you say you do not think so?

A. Because this gentleman, Mr. Lewis, the salesman that sells piece goods, came up to the place one day and wanted me to buy a lot of khakis and denims, and in order probably to make the sale made me believe that it would be a good idea to make this garment up and put it on the market before Miller & Macowsky started to make them, or anybody else started to make them, and, of course, I started to make them.

(Testimony of H. Garfinkel.)

Q. Did you show the garment to Miller & Macowsky? A. My garment? [60—42]

Q. Yes.

A. No, Miller & Macowsky came up to the factory one day and Mr. Macowsky, I believe he made a kick, in fact he told me there was a patent pending, and it would be advisable for me not to make them; and it was for that very reason that I stopped making them a short time after. I did not want to get involved. If there was a patent applied for at that time I did not know.

Q. Did you say anything to him about your getting up the garment? A. To who?

Q. Macowsky?

A. Macowsky was in my factory, I did not invite him up there but somebody else brought him up there and he was nosing around, and saw me, and gave me friendly advice, and I took it.

Q. That was after you had made them up?

A. After I had made a bunch of them up.

Q. And sold them? A. And sold them.

Q. Then when you first got up your garment, how did you get that up?

A. By following Macowsky's garment.

Q. Where did you get Macowsky's garment?

A. Mr. Lewis brought it up to the place, a salesman that sold me denims and other fabrics, and khakis.

Q. What time was that?

A. That was perhaps around about probably a month or so later, I don't know exactly the date, but Mr. Lewis is still alive, you can verify that by subpoenaing him, and he will tell you.

Testimony of A. S. Lowenstein, for Defendant.

A. S. LOWENSTEIN, called for the defendant, sworn.

Mr. MILLER.—Q. What is your business?

A. House manager for E. J. Fiesel.

Q. How long have you been in that business?

A. Since he first started in business, since September, 1913. [61—43]

Q. Do you know anything about the purchase of any play suits from the California Art Works, run by the witness who was last on the stand?

A. Why, yes, we placed an order.

Mr. ACKER.—If your Honor please, I object to this as absolutely immaterial, in view of the fact that Mr. Garfinkel admitted that the goods he made were goods that he copied from the patentees of the patent in suit.

The COURT.—We will hear him; if not material it will be given no consideration.

A. We placed an order with Mr. Garfinkel, who had a partner at that time—I don't know the gentleman's name—on April 10, 1919, and I don't know just how many dozen we placed an order for, but my impression from Mr. Garfinkel at that time, and also conveyed to Mr. Feisel, was that it was a garment that he procured from an Eastern firm through an Eastern salesman, and we were also very friendly with Miller & Macowsky at the time, and Miller & Macowsky knew that we were selling them, and our first delivery was April 23, if I am not mistaken.

(Testimony of A. S. Lowenstein.)

Q. That is, the delivery from Garfinkel to you?

A. Delivery from Garfinkel to us.

Q. On April 10 you say you turned in the order?

A. We placed the order with the California Art Works.

Q. That was the company that Mr. Garfinkel was representing?

A. I understood he was a partner.

Q. Did Miller & Macowsky have any garment on the market at that time?

A. I used to see Mr. Miller every day; after we had sold them some time he told me that he was making that garment, but whether he had a garment on April 10, 1919, I could not answer "Yes" or "No"; I don't think it was on the market. If I am not mistaken, I think we were the first ones to deliver the garments in San Francisco. [62—44]

Q. What was the extent of your trade after that?

A. Well, we sold quite a few; we had on our garments the word "Mickey," and as Mr. Garfinkel has told you here he turned over the word to the Baby Shop, and they had copyrighted the word "Mickey," and the minute that was done we discontinued the manufacture of the garment entirely, in order to incur no trouble.

Q. Is this the name of your concern, shown on Exhibit D, "E. J. Feisel"? A. Yes.

Q. You are with that firm? A. Yes.

Q. Here is an order dated April 10, 1919: Is that the order for these Micky suits?

A. That is a copy of the original order that was given to the California Art Works.

(Testimony of A. S. Lowenstein.)

Mr. MILLER.—That is all.

Cross-examination.

Mr. ACKER.—Q. Can you state whether or not Miller & Macowsky were in business at the time you gave your order to Mr. Garfinkel?

A. Yes, they were directly opposite us if I am not mistaken, at the time.

Q. And had been in business for some time?

A. Yes.

Q. What did Miller & Macowsky manufacture?

A. Miller & Macowsky at that time, if my memory serves me correctly, were making nothing but rompers, making rompers in the style of the Patsy rompers, and there was a lawsuit at that time with him on the Patsy rompers; I do not think he was making play suits, as I said before; I think that we were the first ones to place these on the market, if my memory serves me correctly.

Q. That is the one you received from Mr. Garfinkel?

A. That is the one we received through Mr. Garfinkel.

Mr. MILLER.—Q. Did either Macowsky or Miller ever tell you where they got their design from for these play suits?

Mr. ACKER.—That is objected to as immaterial, irrelevant [63—45] and incompetent, and calling for hearsay evidence.

The COURT.—We will hear it. If not material or competent the court will give it no consideration.

A. If my memory serves me correctly, I think

(Testimony of A. S. Lowenstein.)

Macowsky was a salesman of Miller & Macowsky's firm, and he saw the garment in my house, and he said, "This is a very good garment," and he is going to make it; that is as far as I know; whether he was the originator of the design, I could not answer.

Q. But he saw the garment in your house?

A. Yes, we were very friendly with Mr. Macowsky all the time, and he used to come in and we used to pass personal courtesies to one another.

Q. He said he thought it was a very good garment and he was going to make it?

A. He was going to make it and get a patent on it.

Mr. ACKER.—Q. Did you have this garment in your house prior to obtaining them from Mr. Garfinkel?

A. No.

(A recess was here taken until two P. M.) 64—46]

AFTERNOON SESSION.

Mr. MILLER.—I will offer in evidence a book entitled, "The Dutch Twins," which appears upon its face to have been copyrighted in 1911, and has a notation that it was received in the public library here on May 24, 1915. If necessary, I will call the Librarian to prove when it was received, only I apprehend there will be no question about the publication of the book.

The COURT.—Is counsel familiar with it?

Mr. ACKER.—No objection to it.

(The document was marked Defendant's Exhibit "E.")

Mr. MILLER.—I also offer in evidence Patent Office copy of U. S. Design Letters Patent No. 51,674, of January 8, 1918, issued to Simon E. Davis, of San Francisco, California, assignor, to Levi Strauss & Co., San Francisco, a corporation, entitled, "Design for Children's One-Piece Outer Garment."

(The document was marked Defendant's Exhibit "F.")

I also offer in evidence Patent Office copy of United States Design Letters Patent No. 52,720, of November 19, 1918, issued to William I. Zidell, of Los Angeles, California, entitled "Design for Children's Rompers."

(The document was marked Defendant's Exhibit "G.")

I also offer in evidence Patent Office copy of U. S. Design Letters Patent No. 54,809 of March 23, 1920, issued to William I. Zidell, of Los Angeles, California, entitled, "Design for Child's Romper."

(The document was marked Defendant's Exhibit "H.")

I also offer in evidence Patent Office copy of United States Letters Patent No. 1,255,491, of February 5, 1918, issued to Mary T. Verde, of Boston, Mass., entitled, "Child's Garment."

(The document was marked Defendant's Exhibit "I.") [65—47]

I also offer in evidence Patent Office copy of United States Design Patent of June 15, 1915, to George Averill, of Los Angeles, California, entitled "Design for Doll."

(The document was marked Defendant's Exhibit "J.")

I also offer in evidence Patent Office copy of United States Design Patent No. 60,958, of May 16, 1922, to Louis Kuh, of San Francisco, California, entitled "Design for Child's Garment."

Mr. ACKER.—What is the purpose of the offer?

Mr. MILLER.—That being a patent which covers the design of the defendant which is charged to be an infringement in this case, showing that the defendant is operating under a U. S. patent.

Mr. ACKER.—You are not justifying his acts under these letters patent?

Mr. MILLER.—No; I am offering these letters patent in evidence to show that since suit was commenced the garment which is being designed or being sold by the defendant has been covered by a design patent, thereby drawing the inference that the defendant's design was a patentable design and differing from all other designs that preceded it. Of course, it is not a justification to any acts that he may have done if those acts are otherwise acts of infringement. But it shows the fact, the presumptive fact that his design is different from the others because of the issuance of the patent.

Mr. ACKER.—We object to the introduction of the letters patent, if your Honor please, on the ground that it is immaterial, irrelevant and incompetent, and based on an invention that was created since the issuance of the letters patent in suit, and

(Testimony of Simon E. Davis.)

does not in any way affect or justify the act of infringement. [66—48]

Mr. MILLER.—I am not offering it as a justification.

The COURT.—It will be admitted, and in so far as incompetent or immaterial the court will give it no consideration.

Mr. ACKER.—Exception.

(The document was marked Defendant's Exhibit "K.")

Mr. MILLER.—I also offer in evidence a certified copy of the file wrapper contents of the design Letters Patent of Charles Miller and Peter Macowsky No. 56,450, of October 26, 1920, the same being the letters patent in suit here.

(The document was marked Defendant's Exhibit "L.")

Testimony of Simon E. Davis, for Defendant.

SIMON E. DAVIS, called for the defendant, sworn.

Mr. MILLER.—Q. What is your business?

A. I am in the gent's furnishing goods business.

Q. Have you ever been connected with any firm here? A. I was.

Q. What firm?

A. Levi Strauss & Company.

Q. How long has that company been in business?

A. I don't know; about 60 years, I think, I am not sure.

Q. How long were you connected with it?

(Testimony of Simon E. Davis.)

A. 28 years.

Q. Are you familiar with this art of children's garments, including rompers and play suits, and one thing and another like that? A. I think so.

Q. What has your experience been in regard to these matters?

A. I put the Koverall on the market for Levi Strauss & Co.

Q. Were you the inventor of that Koverall?

A. I was.

Mr. ACKER.—The question is objected to as immaterial, irrelevant and incompetent; it has nothing to do with the question here involved before the court.

The COURT.—It is identifying the witness; he may answer briefly; overruled. [67—49]

Mr. MILLER.—Q. What is the significance in the trade of the term "romper"?

A. As I understand it, a romper is a child's garment with short sleeves, and I always understood it had an elastic at the bottom of the leg.

Q. I will hand you a garment here and I will ask you if you can state what that garment is; just examine it?

A. I would call that a romper.

Q. What kind of a neck do you find there?

A. Commonly known as a square neck.

Q. What kind of sleeves?

A. Short sleeves.

Q. Do you find any binding on the sleeves?

A. Yes.

(Testimony of Simon E. Davis.)

Q. In the shape of a cuff? A. Yes.

Q. What do you find with regard to anything in the shape of a yoke?

A. It has a yoke with trimming on it.

Q. Is that the red binding that comes up in the form of a yoke, there? A. Yes.

Q. What kind of pockets do you find on it?

A. Patched pockets.

Q. Where do you say are located the legs of the garment?

A. Well, they are supposed to be sort of blouses, they come away up, away above the knees.

Q. The child's leg goes through this opening here? A. Yes.

Q. There is a kind of elastic in there?

A. I want to qualify that; this is not a romper, it is called a creeper; it is shorter than a romper. This is for an infant; the garment is made for infants who crawl around the floor and the legs are even shorter than a romper leg, and they open down here so that the mother can put diapers on the baby.

Q. Then when the child gets a little older it has the rompers? A. Rompers or play suits.

Q. How do the rompers differ from this garment?

A. The romper has a little longer leg, and there is elastic in it, and they [68—50] build them up a little bit.

Q. How long have garments of this kind been on the market?

(Testimony of Simon E. Davis.)

A. Longer than I have been living. I don't know how long.

Q. Ten or fifteen years?

A. I would think so, more than that.

Mr. MILLER.—We offer this garment in evidence and ask that it be marked Defendant's Exhibit "M."

Q. I don't know, Mr. Davis, whether you know the fact, or not, but I will hand up this garment to you, and ask you if you know anything about a garment of this kind being on the market?

A. I have seen garments of that type on the market; I have never seen that particular garment.

Q. You spoke of a Koverall garment. I will show you a patent which was issued to Simon E. Davis, which has been marked Defendant's Exhibit "F." State what the garment therein delineated is?

A. This is a copy of my application for a patent for children's Koverall.

Q. What date was that issued?

A. January 8, 1918.

Q. Is that the garment which you refer to as being originated by you and called Koveralls?

A. Yes.

Q. Just describe briefly what that garment is?

A. A Koverall is a sort of improvement on a romper or play suit. It is a garment to wear over the clothes, or as a suit of clothes in itself to protect the child's body.

Q. In order to shorten up the matter, I will ask

(Testimony of Simon E. Davis.)

you if this garment which I now hand you is one of the Koveralls made under your patent?

A. It is.

Q. How long has that garment been on the market? A. Since 1914, I think.

Q. What kind of a neck do you call this?

A. That is a Dutch neck or square neck.

Q. The sleeves are what?

A. These are elbow sleeves, commonly [69—51] known as short sleeves.

Q. What is this arrangement of red?

A. Piping.

Q. What is this red band extending across here?

A. That is a simulation of a belt.

Q. Sewed into the garment?

A. Sewed right on to the garment.

Q. This opens up in the back vertically?

A. Vertically and horizontally, both; it has a drop seat.

Q. The legs, of course, are long?

A. Supposed to reach to the bottom of the shoe.

Q. I notice on this garment a label, Koverall, Registered U. S. Patent Office, Levi Strauss & Co., San Francisco, California; that is the trademark, I suppose, of Levi Strauss & Company?

A. Yes.

Q. Have these garments been sold to any great extent? A. To a very large extent.

Q. Where? A. All over the United States.

Q. Ever since the date when they were put on the market by Levi Strauss & Company.

(Testimony of Simon E. Davis.)

A. Yes.

Mr. MILLER.—We offer this in evidence and ask that it be marked Defendant's Exhibit "N," Koverall.

(The garment was marked Defendant's Exhibit "N," Koverall.)

Q. I show you a garment which has been marked Plaintiff's Exhibit 3, bearing on it a label "Kute Kut," etc., and ask you if you are familiar with this garment?

A. This is the label that belongs on the garment?

Q. Yes.

A. Yes, I am familiar with that garment.

Q. I now hand you another garment, which has been marked Plaintiff's Exhibit 5, with a label on it, saying "Jim Dandy," and ask you if you are familiar with that garment? A. I am.

Q. You have seen both of these garments on the market? A. I have.

Q. Now, I wish you would compare these two garments, Exhibit No. [70—52] 3 and Exhibit No. 5, and state what differences you find between these garments, as a person skilled in this art? This Exhibit 3 you may call the Kute Kut.

A. The Kute Kut has a square neck, and the Jim Dandy has a round neck; the Kute Kut has no cuff, or binding, or piping in the sleeve, other than at the end, and the Jim Dandy has. The Kute Kut has no yoke or no binding where the yoke is, and the Jim Dandy has. I am just taking the front now. The Kute Kut has outside

(Testimony of Simon E. Davis.)

patch pockets and the Jim Dandy has inserted pockets. The Kute Kut has the simulation of a belt and the Jim Dandy has the belt. That is the only difference I can see in the front of the garment.

Q. Now take the back.

A. On the back the same remarks apply to the sleeves, the same remarks apply to the yoke, and that is all.

Q. Now, in view of these differences, and of the similarities that there are between the two garments, in your opinion would a person desiring to purchase one of the Kute Kut garments and using ordinary caution and care that purchasers of these garments use, be deceived into taking the Jim Dandy garment for the Kute Kut, if the Jim Dandy were offered him in place of the Kute Kut?

Mr. ACKER.—The question is objected to as merely calling for an expression of opinion of this witness, the same objection that Mr. Miller made as to the plaintiff's witnesses.

Mr. MILLER.—I am entitled to show it if he was entitled to.

The COURT.—We have excluded testimony in reference to opinion, and we will do the same now.

Mr. MILLER.—I understood your Honor to admit testimony of the opinions as witnesses as to whether or not there would be such similarity as was calculated to deceive?

The COURT.—I don't think so. [71—53]

Mr. MILLER.—I know I objected to it very

(Testimony of Simon E. Davis.)

strenuously at the time, but your Honor let it in, and all I can do is to follow the same course with my witnesses.

Mr. ACKER.—My recollection is you sustained an objection to a similar question.

The COURT.—My recollection is that I did. This is a case where the Court would not be influenced at all by any opinion. It will take its own eyesight when it comes to determining whether the designs are alike or there has been any infringement. The objection will be sustained.

Mr. MILLER.—We note an exception.

Q. In order to get the matter on the record in the proper form, your Honor,—in view of the differences which you have pointed out between these two garments, do you think there would be any likelihood of a person being deceived, who was seeking to buy a Kute Kut garment if he was offered the Jim Dandy garment?

Mr. ACKER.—I make the same objection, if your Honor please, to this question as I made to the previous one.

The COURT.—The objection will be sustained.

Mr. MILLER.—Exception.

Q. These garments, I understand, are for children, are they, Mr. Davis? A. Yes.

Q. Running from what ages?

A. Up to 10 or 12—I would say 10 years.

Q. As high as 10 years? A. I would think so.

Q. And going down as close as what? A. 1.

Q. They are graded according to age?

(Testimony of Simon E. Davis.)

A. Yes.

Q. Who are the people who generally purchase these garments at retail? A. Mothers or women.

Q. Has it been in your experience to note that mothers are rather particular examining garments of this kind when they are [72—54] desirous of purchasing them for their children, that is to say, do you know what degree of care they try to exercise?

Mr. ACKER.—That question is objected to as immaterial, irrelevant and incompetent, and calling for an expression of opinion.

The COURT.—I think so. The objection will be sustained.

Mr. MILLER.—Exception.

Q. How did you happen to design the Koverall?

A. My little girl was about 2 years old, 2½ years old, and I live down at Burlingame, and a friend of mine made her a present of a romper, and that, I thought, was very pretty, it was a little above the usual romper in value that was sold in those days; rompers used to sell around 50 cents, but this romper cost about $2.50, was what I considered a very clever little thing. It was a Dutch romper, and had short sleeves, and was made out of very fine material, and I thought it would be a very nice thing if we made a suit and put it on the market for children that would look good and yet be serviceable, so I sort of evolved the Koverall from that garment.

Q. How long were the legs?

(Testimony of Simon E. Davis.)

A. They were short legs, they were romper legs; they had elastic in them.

Q. Did they have a square Dutch neck?

A. Yes.

Q. How long have you been acquainted with the peg-tops to children's suits?

A. I don't know what you mean by peg-top.

Q. I mean a top that flares out at the hips, and then comes in below.

Mr. ACKER.—The question is objected to, except as it is limited to the peg-top type of garment in suit.

The COURT.—We will hear the answer; so far as not competent or material it will not be considered. The objection is overruled and an exception by counsel noted.

A. This garment from which I evolved the Koverall was known as [73—55] the Dutch romper, it had a flare on it, but was not a long-legged but a short-legged garment, with elastic in the legs, and I simply lengthened my garment; I did not make hardly any flare; in fact I simply increased the size of the body and made a large garment to fit over the other clothes; I have no knowledge of any long-legged flare-out garment.

Q. I am referring to a flare-out garment of any kind, whether short or long sleves.

A. I copied that, that is how I evolutionized that Koverall from that garment, which was a flare-out garment.

Q. The flare was out at the hips? A. Yes.

(Testimony of Simon E. Davis.)

Cross-examination.

Mr. ACKER.—Q. Mr. Davis, in referring to your design Letters Patent No. 51,674, and with the suit before you, I understood you to describe it as having a belt; is that correct?

A. That is no belt; that is a simulation of a belt.

Q. Then when you said a belt you meant a simulation of a belt?

A. I did not say a belt; I said a simulation.

Q. Do you find in the plaintiff's garment a simulation of a belt? A. Yes.

Q. You pointed out to the Court the difference which you found to exist between the plaintiff's garment and the defendant's garment, and I will ask you, with the two garments before you, to point out the similarities which you find to exist between these two garments, this garment which I now hand you being Exhibit 3 of plaintiff, and the one you have in your hand being the defendant's garment.

A. All I can say is this, that there is a great similarity between all of the garments.

Q. I am asking you between these two.

A. You want to know what similarity there is between the two?

Q. Between these two garments.

A. They are blue, made out of [74—56] blue denim, both of the same shape, and they are both trimmed in red, the same shade of red, both have long legs, both have a flare at the hips; they have

(Testimony of Simon E. Davis.)

two pockets each, they both have about the same length sleeve.

Q. Do they each disclose a short waist effect play suit?

A. No, I would not say that. One has a high waist effect and the other has the low waist effect.

Q. Do they each disclose the long leg, peg-top, one-piece comparatively short waist effect belt?

A. No, one has a belt effect and one has a belt.

Q. This has the belt effect and the other has the belt? A. Yes.

Q. You have been making your comparison from the front; viewed from the rear, please point out the similarities?

A. Outside of the material, itself, I would say they are not similar from the back.

Q. You give it as your opinion that the shape of the two garments is not substantially the same?

A. No, I do not say that. I say the shape is substantially the same.

Q. Do you find in the defendant's garment a belt or the simulation of a belt?

A. A simulation of a belt.

Q. That holds true as to plaintiff? A. Yes.

Q. Did you at any time, on behalf of Levi Strauss & Company, make up patterns for a one-piece, long leg, peg-top, short waist effect garment?

A. Yes.

Q. Did you discontinue your intent to manufacture it by reason of the letters patent in suit?

A. I will have to answer that indirectly, if I

(Testimony of Simon E. Davis.)

may. I knew that the plaintiff had purchased either the patent outright, or an interest in this patent, and out of regard for him I did not make it.

Q. You abandoned your idea?

A. I abandoned the idea, I thought it was poor business. [75—57]

Mr. MILLER.—You thought it was poor business, you say?

A. I did not think it was quite ethical, I did not think it was right to.

Testimony of Miss L. V. Richards, for Defendant.

MISS L. V. RICHARDS, called for defendant, sworn.

Mr. MILLER.—Q. Are you employed in business? A. Yes.

Q. By whom? A. O'Connor-Moffatt.

Q. Have you charge of any department there?

A. Children's.

Q. About how long have you been there?

A. About eight months.

Q. Are you acquainted with the children's play suits that are sold by O'Connor, Moffatt & Co.?

A. Yes.

Q. What play suits do they sell?

A. We carry Kute Kuts, Koveralls, and Jim Dandies.

Q. The Kute Kuts are garments manufactured by what concern? I show you Plaintiff's Exhibit 3, and ask you if you recognize that garment?

(Testimony of Miss L. V. Richards.)

A. That is a Kute Kut.

Q. That is one manufactured by Eloesser-Heynemann Company? A. Yes.

Q. You sell these in your store, do you?

A. Yes.

Q. Here is the other one, the Jim Dandy; do you sell that one also? A. We carry the Jim Dandy.

Q. What is the difference between the Jim Dandy and the Jane Dandy?

A. One is for a boy and the other for a girl.

Q. That is the only difference between them?

A. No. There is a difference in the front of them. This one has a fullness in front and the other one has not.

Q. Have you sold garments like Exhibit 5?

A. We sell that one for the girls.

Q. And you sell the two garments that have been referred to here, the Kute Kut and the Jim Dandy; is that true? A. Yes. [76—58]

Q. Who generally comes in to purchase these, what classes of people? A. Mothers.

Q. What degree of care do they use in selecting the different garments that they want?

A. They usually come and tell us what they want.

Q. How do they ask for these things?

A. They come and ask for Kute Kut, Jim Dandy, or Koveralls.

Q. Has anybody ever come in and asked you for Kute Kuts and you handed them out Jim Dandies? A. No, we carry both.

(Testimony of Miss L. V. Richards.)

Q. And you sell them by the names, do you?

A. Yes.

Q. Now, as a person acquainted with this business, do you think there would be any liability for a purchaser, using ordinary caution, to be deceived between these two garments? A. No.

Mr. ACKER.—The question is objected to as calling for a mere expression of the opinion of the witness, the same question that was asked before and objected to.

The COURT.—Sustained.

Mr. MILLER.—Q. Will you please point out the differences that you detect between these two garments, from examining them with ordinary care?

A. A sewed-in belt.

Q. That is, the Kute Kut has a sewed-in belt, you say? A. Yes.

Q. What else?

A. Pockets, square neck, short sleeves, peg top.

Q. Now, the other one has what?

A. This one has a yoke.

Q. Which is the yoke there?

A. This part, here, and then it has a fullness through here that they like for girls.

Q. What do you mean by "fullness"?

A. A fullness from the yoke down, which makes a difference effect garment than the other one.

Q. This red border that you have here is the yoke? A. This is the piping.

The COURT.—Q. Is that the yoke at the back?

(Testimony of Miss L. V. Richards.)

A. That is the yoke sewed on. [77—59]

Q. There is a yoke on the back sewed on?

A. Yes. You see, there is a fullness in here that the other hasn't. That gives the fullness for a girl that is not given for a boy; that a boy does not need.

Mr. MILLER.—Q. What is the shape of the neck here?

A. Round; the other is square; this has a cuff, the other one has not a cuff; one has a patch pocket, and the other has not.

Q. I show you another one of these Jim Dandy garments, which I have ripped apart.

A. I know at a glance that it has a yoke.

Q. This one that I have ripped apart shows the yoke, does it?

A. Yes, the other one has not a yoke; the other is simply a bodice sewed on to the trousers.

Q. This fullness that you speak of is shown in front?

A. Oh, yes, they like that especially for girls; it is especially adapted for girls.

Q. In view of these differences, do you think it is possible for one to be mistaken for the other?

A. No.

Mr. ACKER.—The question is objected to, if your Honor please, as calling for a mere expression of opinion of the witness.

The COURT.—I think so, sustained.

Mr. MILLER.—Exception. I entirely agree with your Honor on the law proposition involved

(Testimony of Miss L. V. Richards.)

there, but I objected to these very questions that were asked by the plaintiff, and that was the ground of my objection. The only reason I am asking them now is becuuse my recollection is that similar questions were asked of plaintiff's witnesses.

The COURT.—If they were, I think they were all sustained. I think it was the statement of the Court if they were not material or competent, they would not be regarded. I am satisfied now they are immaterial, and will not be regarded, [78—60] but you are proceeding properly to save your point.

Mr. MILLER.—As a matter of fact, has anyone, to your knowledge, ever been deceived in buying one of these garments in your store?

A. No; that is the reason why we keep all of them, so as to please the customers.

Q. You would just as leave sell one as the other?

A. Equally so.

Cross-examination.

Mr. ACKER.—Q. Does one sell just as readily as the other? A. Equally so.

Q. You pointed out the difference between the defendant's garment and the plaintiff's garment; I will ask you, with these garments before you, to point out the similarities between the two?

A. The only similarity is they both are blue suits.

Q. Do you find each to be a one-piece peg-top play suit? A. They are each one-piece.

(Testimony of Miss L. V. Richards.)

Q. And peg-top? A. Yes.

Q. Each has the outstanding short arm?

A. This one has short sleeves; one has a cuff, the other has not, one has a round neck and the other has not.

Q. You are now referring to the differences.

The COURT.—You are showing the witness the front of one and the rear of the other.

A. I know them so well I can tell the back from the front.

Mr. ACKER.—Q. Are these garments sold for the use of little girls and boys?

A. Yes. This is one is especially adapted for girls. You can sell either one if they ask for it, but women prefer that for girls.

Q. But they are more adapted for girls than boys; is that true? A. Yes.

Q. I understood you to say one of the garments had piping on the pocket and the other had not: Is that correct? A. On the peg. [79—61]

Q. You mean that the pockets are pegged?

A. The pockets are put in differently; one pocket is put in on the outside, and one on the inside.

Q. Now, referring to the defendant's device, do you find the outline of the patch pocket?

A. The outline, yes; that part is inside and this one is outside.

Q. The outline of the pocket does appear on the exhibit to which I have directed your attention?

A. Yes. You would have to have some stitching to keep the pocket in.

Testimony of Louis Kuh, for Defendant.

LOUIS KUH, called for the defendant, sworn.

Mr. MILLER.—Q. What is the name of your firm, Mr. Kuh? A. Kuh Bros., Inc.

Q. How long have you been in business?

A. About 25 years, the firm has, altogether.

Q. You have been selling these play suits here, have you?

A. We were the first firm to manufacture play suits on the Pacific Coast.

Q. What kind of play suits did you manufacture?

A. We made all kinds of play suits, Koveralls, rompers, creepers, and all kinds of play suits.

Q. What kind of long-legged play suits did you first make?

A. We made what was called a "Stick-in-the-mud" suit, that we used to sell to Weinstock-Lubin in Sacramento, it was a long-leg peg play suit—could I describe it by one of these?

Q. Yes.

A. It was a long-leg peg suit, and it had a longer sleeve on, and it had a little collar coming down, like a man's collar, on each side; it had a band in front like this, and had this drop seat, and had straight legs.

Q. Like this?

A. Like the Koverall; it had straight legs like [80—62] the Koverall, and we manufactured it about ten or fifteen years ago, and we supplied

(Testimony of Louis Kuh.)

Weinstock Lubin with the goods. It was called the "Stick-in-the-Mud" suit, I believe, something like that. It was a garment that sold for 50 cents retail.

Q. What is this garment in blue and white that I show you now?

A. You would not call that a play suit; that is a little boy's wash suit, what they call a little boy's wash suit. The reason why we gave you that was we manufactured that about five years ago, to show you that we manufactured long-leg pegs, as we called them.

Q. What was the date of that, about how many years ago? A. About six or seven years ago.

Q. This has a collar?

A. The garment we made for Weinstock-Lubin at Sacramento had collars like that.

Q. It did not have the square Dutch neck?

A. No, it did not.

Q. But had the attached collar? A. Yes.

Q. That had the peg trousers, also?

A. The peg trousers, yes—oh, no, the garment manufactured for Weinstock-Lubin did not have the peg trousers.

Q. It had straight trousers?

A. It had straight trousers, like Levi Strauss' Koveralls. We were the first one to make play garments on this coast.

Q. What do you mean by play garments?

A. I mean there is no such word as "peg"; it is

(Testimony of Louis Kuh.)

just a fullness on the side. I mean there is no such word as "peg" as applied to that.

Q. This garment that I am handing you now, in blue, is cut with a flare?

A. With a flare; it is not a peg; a peg is something that stands out straight like that.

Q. Did you sell any of these play garments?

A. Of course we sold them, but we have no records, because we did not keep our records so far back; we are only a small concern, and we do not [81—63] keep those records.

Q. This style has gone out of vogue?

A. It is a sort of novelty; we make it one season and do not make it again; it is not staple like other garments, like the play garments.

Q. But you did make these garments and sell them?

A. Yes, we made them up and sold them.

Mr. MILLER.—We offer this garment in evidence, and ask that it be marked Defendant's Exhibit "O."

(The document was marked Defendant's Exhibit "O.")

Q. Now, Mr. Kuh, tell me about any dealings or negotiations you had with Miller & Macowsky before they turned over the patent to Eloesser-Heynemann Company?

A. Well, here was the dealings that we had with Miller & Macowsky; one day we received a letter from Miller & Macowsky that they had secured a patent on that garment that we were

(Testimony of Louis Kuh.)

manufacturing, that garment similar to the one being made by Eloesser-Heynemann Company, that garment you have over there.

Q. Is this the garment?

A. Yes, we made that up in various materials, including blue denim, khaki, etc.; we had been making up that garment, we never knew that anybody had a patent on it, and one day we were notified—you have got the date of the letter there, I don't remember the date, but it was in 1921, that we were notified by Miller & Macowsky that they had a patent on that garment, and we were very much surprised at the same, and I went over to see Mr. Feisel, of the Baby Shop, who I knew was selling these garments, Mr. E. J. Feisel, who was the man that testified this morning, and they claimed that they had been making that garment the whole time, and that it was made by a man by the name of Garfinkel, and that Miller & Macowsky had got the garment from Garfinkel.

Q. I want to get your dealings with Miller & Macowsky. [82—64]

A. Well, as I said before, they wrote us a letter that we were infringing, and account of bad feeling we had between the two firms we did not pay any attention to the letter, and then Mr. Macowsky 'phoned up one day that he wanted to see me; he came over, and my brother I. D. Kuh was present at the time, he said, "Boys, I want to be friends with you," he said, "You are making up a garment that is an infringement upon my gar-

(Testimony of Louis Kuh.)

ment," and he said, "I wish you would stop manufacturing that garment." So I said, "All right, we will let up," and we stopped manufacturing the garment, on the condition that we could sell that stock we had, and he said that would be perfectly satisfactory to him if we would stop manufacturing the garment altogether, and we promised to do so, so we did; so we started to sell the stock out that we had left.

Q. You did stop manufacturing?

A. We stopped manufacturing the garment as soon as we had this conversation with Mr. Macowsky, and that was satisfactory to him.

Q. He agreed that you could sell what you had on hand?

A. He agreed in the presence of my brother that we could sell the garments that we had on hand.

Q. Now, I show you this garment which was handed you a moment ago and ask you if this is the one that you had talked about?

A. This is the garment. We formerly called it the Jim Dandy, and now we call it the Jane Dandy.

Mr. MILLER.—We offer this in evidence and ask that it be marked Defendant's Exhibit "P."

(The garment was marked Defendant's Exhibit "P.")

Q. Now, did you dispose of that stock which was on hand?

A. We disposed of nearly all of it except about 100 dozen.

(Testimony of Louis Kuh.)

Q. What happened in regard to those?

A. Can I tell this in my own way?

Q. Yes. [83—65]

A. I had several conversations with Mr. Eloesser at the time that Miller & Macowsky claimed that they had a patent, and we were talking the matter over of going together to fight them on the thing, because we did not believe that they had a patent on it, or that they had a right to have a patent on that garment, because garments with the fulness, with the flare, and also long-legged garments and short waist garments had been made up before, so I talked this matter over with Mr. Eloesser and one day he surprised me very much by 'phoning to me and saying, "Mr. Kuh, that thing is off, because we have bought out patent rights from Mr. Macowsky," that they had made some agreement with Mr. Macowsky that they could also manufacture the garments; so he called one day, a little later on, I don't know—we have got the letters there, though—I think he came over and he notified us that they had bought the patent rights out for that garment, and that we should stop selling them. Well, I went over to see him, or he came over to our place, and he said, "Mr. Kuh, why don't you sell us out the stock you have on hand"? So I said—I did not like the idea, but I will consult with my brother, that is, my brother Irwin, who is present here—I consulted with my brother, and so I sent him a sample over of the stock that we had on hand, I don't just remember

(Testimony of Louis Kuh.)

what we had on hand, it might have been a hundred dozen, or 150 dozen, or 75 dozen, I could not just remember what we had on hand, and I did not receive any reply from him. Then I wrote him a letter—you have got the letter right here—and told him that I had not heard anything from him, that he promised to buy these goods and he hadn't come through, and then he replied to the letter that he did not agree to purchase them at any certain price, so then the matter ended right there, as far as we were concerned. Then, as I say, we had about 100 dozen garments left [84—66] over, and as we were starting to manufacture a new garment, we thought it best to avoid any controversy, or anything like that, so what did we do but —Mr. Eloesser said the only objection he had to our garment was that we were putting that little fullness on the side; he claimed that was the only thing that was wrong with it; he claimed that if we would make a garment just like Levi Strauss made their Koveralls, and like we always made up garments before, then he would have nothing against it, we could continue making it; he said the only thing he objected to was the peg—so what did we do? We took that hundred dozen garments and cut out the flare, and made them a straight garment, just like Levi Strauss' Koveralls, the garments that we had always been making, we made a straight garment, we cut them off and sewed them up and sold them to a store in Sacramento, and you have the invoices there, the

(Testimony of Louis Kuh.)

copy of the invoices on the yellow sheets, showing that we sold them.

Q. When you went to Eloesser-Heynemann with this stock that was on hand, which was 75, 100 or 150 dozen, what goods were they?

A. They were the flare goods.

Q. Were they what had been left over from the stock that you had when you talked with Macowsky? A. Yes.

Q. And they were the same goods which Miller & Macowsky had told you you could sell?

A. Yes, the same goods.

Q. And they are represented by this device here?

A. Yes.

Q. Represented by Exhibit "P"? A. Yes.

Q. Then after Eloesser-Heynemann refused to take these goods off your hands, then you say you cut out the pegs and made them straight legs?

A. Cut out the flare and made a straight leg like the Koverall, or like the other garments we were selling.

Q. And then sold them to this man in Sacramento?

A. Sold them to this man in Sacramento, and you have got the copies of the invoices [85—67] there.

Q. What did you do then about getting up another garment?

A. The fact of the matter is that when we first heard that Macowsky claimed that he had a patent on this garment, we had decided that we would

(Testimony of Louis Kuh.)

get out another garment, so I sent for Miss Loeb, of the Emporium, she is the manager of the Children's Department in the Emporium, and I sent for Miss Loeb, and Miss Loeb has bought quite a few of our products, and I said, "Miss Loeb—"

Mr. ACKER.—I do not think this is at all material.

Mr. MILLER.—Q. Just tell what happened, without any conversation.

A. We sent for Miss Loeb and showed her two garments I had there, and from those two garments we originated our new garment, this one here,—from the little pink garment and that garment there—that is how we originated that garment.

Q. You mean the little pink one? A. Yes.

Q. And the blue garment?

A. Yes; we took the yoke from this garment, here, and we took the peg from this garment, and put the two into one garment.

Q. Exhibit "M" is the pink one?

A. Yes, we joined these together—

Q. (Intg.) Wait a minute. The other one is Exhibit "O"? A. Yes.

Q. Now, then, you joined these two garments together into one garment?

A. Into this garment.

Q. From that you produced this garment here, Exhibit 5? A. Yes.

Q. There is one other garment I will hand you and ask you if you can tell what that is?

(Testimony of Louis Kuh.)

A. That is a romper.

Q. Whose garment is that?

A. I think that is a garment made in Los Angeles—a Patsy, isn't it?

Q. Yes. Is that what is known as the Zidell garment? A. Yes.

Q. They have a square neck there, have they?

A. Yes.

Q. And short sleeves? A. Yes.

Q. A cuff on the sleeves?

A. Yes, and this band. [86—68]

Q. In front? A. Yes.

Q. And they have pegs to the sides of the garments there, have they? A. Yes.

Q. And they have a cuff down at the bottom here? A. Yes; that is a romper.

Q. But they have no long legs?

A. No, that is for smaller children.

Q. If you wanted to put two long legs on that it woud be exactly the same thing as this patent, would it? A. Just exactly the same thing.

Mr. MILLER.—We offer this in evidence as Defendant's Exhibit "Q." That is all.

(The garment was marked Defendant's Exhibit "Q.")

Cross-examination.

Mr. ACKER.—Q. Did I understand you to say that you collaborated with Miss Loeb in the design of the garment which you are now placing on the market? A. Yes.

(Testimony of Louis Kuh.)

Q. So that that was a sort of joint idea of yours and Miss Loeb's together? A. Yes.

Q. Nevertheless, you applied for letters patent on that garment, did you? A. Yes.

Q. You applied for it in your own name?

A. Yes.

Q. And you took the oath that you were the sole inventor of it?

A. Yes, the sole inventor, because those were our garments—this was our design.

Q. What do you mean by that?

A. Miss Loeb helped me just like a designer in our place would help me.

Q. This is the garment I understand you are now making, which is Plaintiff's Exhibit 5: Is that correct? A. I don't know the number of it.

The COURT.—Q. That is your garment?

A. Yes. [87—69]

Mr. ACKER.—Q. Did I understand you, or did you wish to have the court understand, that this is not a peg-top, long-leg garment?

A. No, I don't wish the court to understand that at all. It is a long-leg straight garment. I don't know what you mean by "peg"; there is no such word as peg.

Q. You have never advertised it as the peg trouser? A. Oh, we have, yes, advertised.

Q. What do you mean by the word "peg"?

A. That is a name that has been applied for a Los Angeles concern for quite a while, Zidell, they called it a peg, they were the first inventors of it.

(Testimony of Louis Kuh.)

Q. Is this an advertisement which emanated from your house? A. Yes.

Q. I notice a cut appearing on it. A. Yes.

Q. That is a picture of this garment which you are now manufacturing? A. Yes.

Q. I note you state on the card that you have just been granted original United States Letters Patent?

A. Yes.

Q. What do you mean by the word "original"?

A. Original, because I don't think they would grant a patent unless it was original.

Q. Then every patent, in your opinion, would be an original patent?

A. As far as I know; I am not very well acquainted with it.

Q. You are using it in that sense?

A. That is original, we consider that an original patent.

Q. Wherein does this differ from your former garment?

A. Do you want me to tell the difference?

Q. Yes, the device that you abandoned and discontinued the manufacture of?

A. In the first place, the Kute Kut has a Dutch neck. [88—70]

Q. I am not referring to the Kute Kut; where do you differ from the former garment?

A. We differ from the former garment in this way, here, that instead of being a square neck, we made a round neck, instead of having a plain sleeve we made a cuff; we also placed a yoke in front and the back. It is not a band just placed across, it is

(Testimony of Louis Kuh.)

a separate piece, it gives it fullness here for a girl, it gives a lot of fullness in front. And we did the same thing in back. Another thing, we did not put a high waist line on there, we have no high waist line like was claimed originally; we have no waist line at all; that is all loose from the yoke down. We do not place any pockets on the outside, and our pocket is different-shaped, altogether, because it goes all around; their pocket is just a little patch pocket. Another thing, we have the band cuffs, and then we have this extension here with a piping all around to protect it from ripping.

Q. You have testified as to certain conversations you had with Mr. Eloesser; is it not a fact that Mr. Eloesser agreed that he would purchase from your firm such of these play suits as you had on hand, take them off your hands, provided you would discontinue the manufacture of play suits? A. Yes.

Q. Was it not for the reason that you refused to discontinue the manufacture of them that Mr. Eloesser refused to take them off your hands, the goods you had?

A. That particular garment we did discontinue.

Q. Did you not show Mr. Eloesser the garment you are now making and he state to you that he considered that to be just as much an infringement as the other garment?

A. Yes, he did, and I told Mr. Eloesser that he was entirely wrong, that it was a different garment altogether, and he said, "Mr. Kuh, I give you credit for getting out a nice garment." [89—71]

(Testimony of Louis Kuh.)

Q. Did this conversation which you have reference to take place at your office, or at the office of Eloesser-Heynemann Company?

A. It was probably about two years ago, isn't it, something like that, I could not just remember now —it is about two years ago, I believe; I know Mr. Eloesser was over in our place once, and I was over in his place once.

Q. At which of these conversations was it which you have referred to, that your brother was present?

A. My brother?

Q. Your brother. I understood you to say your brother was present at this conversation.

A. My brother was present at this conversation?

Q. I am asking you?

A. No, I don't just remember that.

Q. Was your brother present at any conversation that you held?

A. I cannot just remember whether he was or not.

Q. Is Mr. Irwin Kuh your brother? A. Yes.

Q. The gentleman sitting over there? A. Yes.

Redirect Examination.

Mr. MILLER. Q. What conversation was it that your brother was present at that you referred to a moment ago?

A. I referred to a conversation with Mr. Macowsky.

Q. Not with Mr. Eloesser?

A. No. He was present at the conversation with Mr. Macowsky, when Mr. Macowsky came over in our place.

(Testimony of Louis Kuh.)

Q. Did you make any memorandum of the conversation at that time? A. Yes.

Q. What became of the memorandum?

A. I think I gave it to you with some other papers.

Q. Where did you put the memorandum?

A. We kept all of these different things in a safe.

Q. Is this paper which I now hand you connected with this matter in any way, shape or form?

A. This is a memorandum.

Q. What was the occasion of making that?

A. Well, Mr. Macowsky [90—72] was in, and he wanted us to discontinue making these garments, and we kind of made up, we were bad friends for a while, and we made up, and he said, "Boys, I will treat you all right, you can sell the garments you have got on hand."

Q. Who made this memorandum?

A. I did. This is my writing.

Q. That was made at the time?

A. About that time that we received the letter from Mr. Macowsky; then he came over to see us.

Q. Does this memorandum embody what Mr. Macowsky said? Just read it over and see.

Mr. ACKER.—If your Honor please, it does not appear that this is proper redirect examination.

The COURT.—The objection is sustained.

Mr. MILLER.—It is just simply to show that he made a memorandum of the occurrence at that time.

Q. Does this memorandum serve to refresh your recollection in any way regarding the conversation

(Testimony of Louis Kuh.)

with Mr. Macowsky, and the agreement to let you sell the stuff that was then on hand?

A. I made a memorandum of all these things.

Q. Anyway, you did make a memorandum of it at the time?

A. I made a memorandum of everything connected with this proposition.

Q. And that is the memorandum which you now hold in your hand? A. Yes.

Testimony of Irwin D. Kuh, for Defendant.

IRWIN D. KUH, called for the defendant, sworn.

Mr. MILLER. Q. Mr. Kuh, you are a member of Kuh Bros., are you? A. Yes.

Q. How long have you been in that firm?

A. Since the existence of the firm.

Q. Are you acquainted with the business of play suits, and rompers, [91—73] and Koveralls, and overalls, and things of that kind? A. Yes.

Q. What kind of goods do you manufacture?

A. We manufacture play suits of all descriptions, we manufacture also ladies' wear.

Q. Where is your factory?

A. We have two factories; we have one now at 500 Howard, and the other is on Sacramento Street.

Q. Are you acquainted with these play suits that form the subject matter of this controversy here?

A. I am.

Q. Were you present at any interview with Macowsky, or Miller & Macowsky, regarding this

(Testimony of Irwin D. Kuh.)

patent matter before they turned it over to Eloesser-Heynemann? A. I was.

Q. What occurred at that time?

A. We received a letter from Miller & Macowsky, informing us they had secured a patent on this garment, and for us to stop making the garment, so in a few days Mr. Macowsky came over, and we had not been very good friends, the firms had not been, and he said, "Let us get together on this, you stop manufacturing this garment, and sell what you have on your hands, and everything will be all right," which, after talking over with my brother, we agreed to do.

Q. That is, he gave you permission to sell the garments that you had on hand? A. Absolutely.

Q. Then you agreed to not make any more of these garments; is that a fact?

A. That is absolutely the fact.

Q. Is this the garment which you were then selling, which is marked Exhibit "P"?

A. That is the garment in question.

Q. That, of course, is like the Miller & Macowsky patent, is it not?

A. I should judge the same thing.

Q. About how many of these garments did you have left on hand at the time Eloesser-Heynemann took over the patent?

A. I don't know, between 100 and 150 dozen, I should judge; I am not exactly sure.

Q. Are those the ones that were left on hand after

(Testimony of Irwin D. Kuh.)

your conversation [92—74] with Mr. Macowsky in which he told you you could sell? A. Yes.

Q. Now, what became of the others?

A. Those garments were laid away, and we took those garments and took the sides off of them and made them a straight leg like the Koverall, and we sold them to a concern in Sacramento.

Q. Please look at these two garments, here, Exhibits 3 and 5, Exhibit 3 being the Kute Kut garment, and Exhibit 5 being the Jim Dandy garment of yours, and point out the differences between these, so as to distinguish one from the other.

A. The Kute Kuts have a square or a Dutch neck; the Jim Dandy has a round neck; the Kute Kut has piping at the end, and the Jim Dandy has a cuff; the Kute Kuts have a band which is supposed to represent a belt, while the Jim Dandy has a yoke both front and back, and has a sort of belt which buttons in the front. The Kute Kut has two patch pockets in front, and the Jim Dandy has the pockets in the side, on the lap known as the peg.

Cross-examination.

Mr. ACKER. Q. Did Mr. Eloesser inform your firm that they were the exclusive licensees for Miller & Macowsky under the letters patent in suit prior to acquiring all right, title and interest in and to the patent?

A. I don't know a thing about it if he did.

Q. You have no knowledge of that, one way or the other? A. No.

(Testimony of Henrietta Loeb.)

Q. You are manufacturing these garments at the present time, are you not?

A. We are manufacturing Exhibit 5.

Testimony of Henrietta Loeb, for Defendant

HENRIETTA LOEB, called for the defendant, sworn.

Mr. MILLER. Q. What is your business, Miss Loeb? [93—75]

A. I am buyer for the Emporium, downstairs.

Q. What kind of goods do you have to do with there? A. Infants' wear and muslin underwear.

Q. You mean the Emporium down on Market Street?

A. Market Street, in the downstairs portion.

Q. A very large store, is it not? A. I think so.

Q. What goods do you deal with?

A. I buy the children's dresses, infants' wear, and ladies' muslin underwear.

Q. Have you become pretty well acquainted with the different kinds of play suits that are on the market? A. I think so.

Q. What play suits have you sold there, whose make?

A. Up to three years ago I was the buyer in the upstairs department, and we carried Levi Strauss' Koveralls; three years ago last January I changed positions in the store, and I went downstairs, in January, 1920, and found play suits, Jim Dandies, in the department, and we continued selling them.

(Testimony of Henrietta Loeb.)

Q. What other play suits do you sell besides the Jim Dandy?

A. We do not carry anything else, there were none there; there are a few other models there, different models, that the stock was heavier than the Jim Dandies.

Q. Do you carry any Kute Kuts?

A. We do not, not in our department.

Q. Does the store carry any?

A. Yes, they carry them upstairs on the second floor, in the infants' wear department.

Q. Are you familiar with the Kute Kut?

A. I have seen the samples, yes.

Q. I will show you two garments, one of them Exhibit 3, which is a Kute Kut, and ask you if you have seen that sample? A. Yes.

Q. And another one, Exhibit No. 5, which is called the Jim Dandy, and ask you if you are familiar with this one also? A. I am.

Q. Now, as a person acquainted with things of this kind, will [94—76] you please point out for me the differences between these two that would attract your eye?

A. I consider these two garments entirely different, one is a strictly girls' garment, and the other one a boys'.

Q. Point out the differences between the Kute Kut and the Jim Dandy.

A. It has a fullness here.

Q. Which one do you mean?

A. This one here, the Jim Dandy.

(Testimony of Henrietta Loeb.)

Q. What kind of a shaped neck do you find?

A. This is a round neck.

Q. The other one, of course, is a square neck?

A. Yes, what they call a square Dutch neck.

Q. That is called a square Dutch neck?

A. Yes, just a matter of difference of opinion.

Q. What do you find with respect to the pockets of the two, as to difference?

A. This is entirely different, this is the continuation of the yoke.

Q. You mean the Jim Dandy?

A. The Jim Dandy is the continuation, and the pockets are concealed in the fullness at the sides.

Q. Where are the pockets in the other?

A. They are on the outside.

Q. Would these differences make any impression on you, or attract you?

A. Decidedly. It is a better garment for a girl.

Q. The Jim Dandy?

A. Yes, this garment here is a better garment for a girl, and the reason why I think it is different is because it is patented, and I do not see how the United States Patent Office could issue any patent on anything that was not different.

Mr. ACKER.—I object to that.

A. It is just my opinion.

The COURT.—The Court will give it no consideration.

Mr. MILLER. Q. Now, in regard to this Exhibit 3, do you find the waist band here extending up underneath the arm-pits? [95—77]

(Testimony of Henrietta Loeb.)

A. No. This I would consider a little bit lower, and the yoke effect is the continuation of the front; it has the same effect in the back as in the front in regard to the yoke.

Q. Does the yoke have any effect on the appearance? A. Yes, absolutely it does.

Q. How about the cuffs?

A. The cuffs, as well, and has a loose belt.

Q. The belt has a decided effect? A. Exactly.

Q. Do you think you could be deceived into taking one of these garments for the other?

Mr. ACKER.—That question is objected to as calling for an expression of opinion.

The COURT.—Yes.

Mr. MILLER. Q. Nobody could fool you on these two garments, could they?

Mr. ACKER.—The same objection.

The COURT.—Sustained.

Mr. MILLER. Q. Do you know of anyone who has ever been deceived into taking a Jim Dandy for a Kute Kut?

Mr. ACKER.—The question is objected to as immaterial, irrelevant and incompetent.

The COURT.—Sustained.

Mr. MILLER.—That is a fact, if she knows of anyone who has ever been deceived.

The COURT.—It depends upon the appearance, what they are, in fact, as laid before the Court.

Mr. MILLER. Q. Were you down with Mr. Louis Kuh when he designed this Jim Dandy garment? A. Yes.

(Testimony of Henrietta Loeb.)

Q. Just tell us what occurred?

A. Mr. Kuh 'phoned to me one day and said, "Miss Loeb, we are going to make up and bring out a new garment, and I would like to see you in regard to it." So I came down to the office, and he showed me two garments, [96—78] these two garments right here.

Q. You mean the pink garment and the blue garment?

A. Yes, one was a creeper and the other was a boy's wash suit.

Q. Which is the creeper? A. This one here.

Q. This one marked Exhibit "M" is what you call a creeper? A. Yes.

Q. And the other one, which is marked Exhibit "O," you call that a boy's wash suit?

A. A boy's wash suit.

Q. Proceed.

A. So he showed me the two garments, and he said he thought he could combine the two, and I said, "That is a very splendid idea, if you do, just change your yoke and make it round and put a belt in front; I suggested that, and the garment was shown me a few days later—a sample was shown me a few days later, and I just suggested making it round here, instead of square, and having the belt come across the front, to make it a decided girls' garment.

(Testimony of Henrietta Loeb.)

Q. The yoke on the pink garment here is square, and you suggested to make it round?

A. Yes, and I think it is not as high as this garment, here.

Q. You did not cut the pattern yourself, did you?

A. No, I think he had them cut.

Cross-examination.

Mr. ACKER.—Q. As I understand, it was your suggestion to Mr. Kuh that he embody the yoke and the belts: Is that correct? A. Yes.

Q. Did you receive any instructions from your superior at the Emporium not to buy the play suits of Kuh Bros. on the ground that it was near to the patented design play suits owned and controlled by Eloesser-Heynemann, and the firm did not care to get into any litigation?

Mr. MILLER.—Objected to as immaterial, irrelevant and incompetent. [97—79]

The COURT.—I think so.

Mr. MILLER.—That is our case.

Testimony of Herbert Eloesser, for Plaintiff (Recalled in Rebuttal).

HERBERT ELOESSER, recalled for plaintiff in rebuttal.

Mr. ACKER.—Q. Mr. Eloesser, you have heard the testimony of Mr. Louis Kuh, with reference to the conversation he held with you regarding play suits, and your offer to take the play suits he had on

(Testimony of Herbert Eloesser.)

hand, purchase them—you remember the testimony? A. I remember the testimony.

Q. What have you to say with reference to the correctness or incorrectness of the testimony of Mr. Louis Kuh on that point?

A. I differ entirely in my recollection of that occurrence. I do not agree with Mr. Kuh's recollection of it in very many particulars. I was up at Mr. Kuh's place only once, and Mr. Kuh came in to us on several occasions. He came into us the first time in connection with this matter that I am speaking of, and told me that he had received notice from Miller & Macowsky that their garment was patented, and that they were infringing on this patent; he wanted to know whether we did not agree with him that there was no basis for such a notice, and that we had a perfect right to make these things, that nobody had any right to exclude other manufacturers from manufacturing garments of this kind. I explained to him that I could not give him any off-hand answer, and that if Miller & Macowsky had a patent that was valid, that we had no desire to infringe on it, and the only thing I could do was to find out whether they did have such a patent. I explained to him that I would let him know when I had further information. About this time, we were called on by a number of other people who were making similar [98—80] gar-

(Testimony of Herbert Eloesser.)

ments, and I gave them similar answers. I proceeded to get an opinion from Munn & Company.

Mr. MILLER.—I object to that.

Mr. ACKER.—Do not repeat any conversation. What took place at this conversation?

A. That was the conversation that I had with him on that particular occasion. The next conversation that I had was to let Mr. Kuh know that we had made license arrangements with Miller & Macowsky on the strength of the opinion we had received that our garment was an infringement, that this license arrangement gave us the exclusive right on the Pacific Coast to manufacture the goods, and that I believe that he had better dispose of his stock to Miller & Macowsky, because this license arrangement with us also specified that they had to protect their patent.

Q. Mr. Eloesser, what I wish to ascertain is whether or not the agreement or offer you made to Mr. Kuh was to take this garment off his hands, provided he would discontinue the infringing act.

A. I was just coming to that. Then Mr. Kuh told me that they and his firm were at outs, he spoke of the old feeling, and he said, under the circumstances they could have no dealings with Miller & Macowsky, and I think that it would be explained.

The COURT.—Just tell us what was said.

(Testimony of Herbert Eloesser.)

A. I told Mr. Kuh if he was not willing to deal directly with Miller & Macowsky that we would probably be willing to arrange to take these garments off his hands, provided he would agree not to make any more of the same design, and Mr. Kuh refused to make such an agreement, and he gave as a reason for not making such agreement the fact that he was planning to put out another garment, and I said that we would have to hold these whole negotiations for the purchase of his stock in abeyance until we could see what the other garment was going to be. It appeared to me to [99—81] be inconsistent that he should refuse to make an arrangement with us, on the strength of a new garment, if that garment did not infringe. Mr. Kuh said that he was not ready to show that garment, that he had not it in shape, or was not prepared to let me see it, but he expressed his willingness to let me see it when it was ready. I believe that was the end of that conversation. The next conversation took place when Mr. Kuh advised us that this garment was now ready, that he was willing to let me see it. That was the occasion when I called at his place of business and he showed me this sample, and I told him that, in my opinion, it was just as much an infringement of the patent as the other one, and he at that time said that he knew all about patents, and he knew what was an infringement and what was not an infringement.

(Testimony of Herbert Eloesser.)

Q. There have been certain letters patent introduced in evidence here as exhibits on behalf of the defendant, Mr. Eloesser; please examine those letters patent with the letters patent in suit before you and state the differences and similarities you find to exist between them?

A. The first one before me, Mr. Acker, is marked Exhibit J; there is an illustration of a doll; that does not seem to illustrate the garment in any particular; it shows a doll dressed in a two-piece garment with a sort of waistcoat effect, that has lace down in front, and there is a sort of panel-shaped trousers, with apparently the effect of a belt put on at the top, very narrow at the bottom. It don't look as though it would be a practical design of a garment to be used. The proportions are quite different. The small waist on the doll is quite differently proportioned from what our design shows, also down at the hips instead of a short-waisted article.

The next one that I have before me is marked Exhibit I; that seems to be a one-piece garment, with a skirt; it does not seem [100—82] to have any type of legs at all, it is quite different; I think the fact that it has a skirt and hasn't any legs to it would make it so different that we need consider it no further. The next Exhibit is marked H; this is the style of romper that was put on the market by Patsy, it has not any legs, it has openings for the feet to go through, with a cuff effect. It is not a play suit or a long-legged affair, in any sense of the word. Exhibit "G" partakes of the same general

(Testimony of Herbert Eloesser.)

description as Exhibit "H," except that it has a little different ornamentation on it. Exhibit "F" is a boy's style play suit, which was the only available type of play suits on the market at the time that our design was introduced. It is a straight garment, with a very low waist, and has none of the appearances of the peg-top style with the high waist and other features of our design.

Q. What have you to say with reference to Defendant's Exhibit "A"?

A. Defendant's Exhibit "A," as I see it, has a large bloomer-like back, so to speak, with openings at the bottom, with a little cuff, and has not anything that I would consider to be legs there. It is a two-piece article, the upper half or upper portion entirely separate from the bottom portion. It has no appearance of any pocket at all.

Q. What have you to say with reference to the publication introduced in evidence and known as the Dutch Twins?

A. This is a picture of a child dressed in a two-piece suit, apparently the lower part being trousers of the bloomer style, and in no respect a peg-top garment; they seem to be nearly as big at the bottom as at the top, and they seem to be bound in to the ankles with a tape or elastic of some kind; it has not any resemblance, in my opinion, to a peg-top garment. The upper part seems to be a separate waistcoat, it seems to be put on over a shirt, and there seems to be short sleeves up there. [101—83]

(Testimony of Herbert Eloesser.)

Cross-examination.

Mr. MILLER.—Q. Referring to the Davis patent, Exhibit "F," that you have there, is it not a fact that the only difference between your design and his design is that Davis has straight legs and you have peg-top legs?

A. No, that is not the only difference.

Q. What other difference is there?

A. His garment is a low-waisted garment; our waist comes very much higher than his garment.

Q. If you were to change these straight legs into peg-topped, just as I have indicated in pencil, there, then do you think that would be the same thing as yours?

A. I should say that the short waist effect would be lacking.

Q. Anything else?

A. Nothing else occurs to me at the moment.

Q. So that if you were to shove that waist or belt up underneath the arms and change the straight legs to peg tops, that would be the same?

A. If you changed their design to our design it would be the same.

Q. If I would make this change in their design it would be the same as your design?

A. Yes, it would be similar to our design.

Q. Is there any difference between your patent and the Zidell patent, other than the fact that long legs have been attached to a design of that kind?

A. I think long legs attached to that would not make anything like ours.

(Testimony of Herbert Eloesser.)

Q. If I were to draw the legs down in that way, it would be the same thing as yours, practically, wouldn't it?

A. No, it would look entirely different.

Q. You have the same square Dutch neck?

A. No.

Q. What is the difference between yours?

A. This seems to be cut down into the bodice at the front and back.

Q. Look at the other one, Exhibit "H"; you have the same square Dutch neck?

A. Not the same as that. [102—84]

Q. What is the difference?

A. That one is also cut much deeper than ours. That is a very extreme Dutch neck, and our comes much higher.

Q. Do you claim anything from the fact that your Dutch neck is shallow rather than deep?

A. Only a part of the design.

Q. This Exhibit "G" also has a short sleeve, hasn't it? A. Yes.

Q. Any difference between this and this?

A. They are somewhat differently shaped, but it is not a serious difference in itself.

Q. Defendant's Exhibit "G" also has a belt or waist effect up underneath the arm-pits, the same as yours, hasn't it?

A. I don't quite understand your question.

Q. This Exhibit "G" also has a belt with buttons on it? A. Yes.

Q. Arranged underneath or near to the arm-pits?

(Testimony of Herbert Eloesser.)

A. Yes.

Q. Is there any difference between that and this?

A. No.

Q. Defendant's Exhibit "G" also has the flaring points on the hips, has it not?

A. I should say that it had not on the hips It is quite differently arranged.

Q. It has a flare effect on the sides, has it not?

A. It has a flare effect on the sides, yes.

Q. Is there any difference between that flare and the flare in your design? A. I think there is.

Q. Then, according to that, your patent must be construed by these little details or differences which you have mentioned a few moments ago, the difference of the low neck, and the legs, and so on?

A. I have to qualify that in my answer. I cannot say that they are little differences.

Q. The differences which you have specified in your examination? A. Yes, large differences.

Q. And those differences which you have specified in your examination are the differences between your patent or your design and the others?

A. They are the principal differences. [103—85]

Q. Are there any other differences? If so, you have an opportunity now to tell us what other differences there are.

A. I would have to examine them more closely. If you will let me have the design in my hands I will do it.

Testimony closed.

It is hereby stipulated and agreed that the foregoing is a full, true and correct copy of the testimony given in the foregoing case; it is further stipulated that the same may take the place of the statement of the evidence on appeal provided for by Rule 75 of Equity Rules.

N. A. ACKER,
Attorney for Plaintiff.
JOHN H. MILLER,
Attorney for Defendant.

Dated August 18th, 1923.

[Endorsed]: Filed August 21, 1923. Walter B. Maling, Clerk. [104—86]

(Title of Court and Cause.)

Petition for Order Allowing Appeal.

Eloesser-Heynemann Co., complainant in the above-entitled cause, conceiving itself aggrieved by the final order or decree filed and entered on the 23 day of April, 1923, in the above-entitled cause, whereby it was ordered, adjudged and decreed that the complainant's bill of complaint in said cause be dismissed with costs to the defendant, now comes, by N. A. Acker, Esq., it's solicitor and counsel, and petitions this Court for an order allowing it, Eloesser-Heynemann Co., to prosecute an appeal from said final order or decree to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided;

and also that an order be made fixing the amount of security which complainant, Eloesser-Heynemann Co., shall give and furnish upon such appeal, and that upon giving such security, all further proceedings in this Court be suspended and stayed until the determination of said appeal by said United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

Dated April 27th, 1923, San Francisco, Cal.

N. A. ACKER,
Solicitor for Complainant.

[Endorsed]: Filed Apr. 27, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [105]

(Title of Court and Cause.)

Assignment of Errors.

Comes now complainant and specifies and assigns the following as errors upon which it will rely upon its appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the order or decree of the District Court for the Southern Division of the Northern District of California, Second Division, dismissing complainant's bill of complaint, which order or decree was made and entered on the 23 day of April, 1923.

1. That said District Court for the Southern Division of the Northern District of California, Second Division erred in dismissing said bill of complaint.

2. That the said District Court for the Southern Division of the Northern District of California, Second Division, erred in not ordering or decreeing that complainant's Design Letters #56,450 in suit were void by reason of anticipation and prior publication.

3. That the said District Court for the Southern Division of the Northern District of California, Second Division, erred in not ordering or decreeing that said Design Letters Patent #56,450 were valid letters patent.

4. That the said District Court for the Southern Division of the Northern District of California, Second Division, erred in not ordering or decreeing to complainant the relief prayed for, in and by its said bill of complaint.

5. That the said District Court for the Southern Division of the Northern District of California, Second Division, after finding that the defendant's garment in entirety is plaintiff's in appearance and impression, erred in not finding infringement of the letters patent in suit.

6. That the said District Court for the Southern Division of the Northern District of California, Second Division, erred in holding the garment of Design Letters Patent #56,450, to be none other than the Hollandese Boy's Costume from time immemorial known everywhere for use in original or modified form from [106] paintings, engravings, illustrations and literature.

7. That the said District Court for the Southern Division of the Northern District of California,

Second Division, after expressing no doubt as to the oddity, quaintness and simple artistic merit of plaintiff's design, the utility thereof, attractiveness, popularity and wide use of the garment of Design Letters Patent #56,450, erred in not finding invention disclosed thereby.

8. That the said District Court for the Southern Division of the Northern District of California, Second Division, erred in holding that as between plaintiff's design garment and the illustrations contained in defendant's exhibit publication entitled "The Dutch Twins," there was no substantial difference.

9. That the said District Court for the Southern Division of the Northern District of California, Second Division, erred in holding that in appearance and impression the garment of the design letters patent in suit and the design of garment illustrated in defendant's publication exhibit entitled "The Dutch Twins" presented one and the same design, of which either patented, the other would anticipate or infringe.

In order that the foregoing assignment of errors may be and appear of record, the complainant presents the same to the Court and prays that such disposition may be made thereof as is in accordance with the laws and the statutes of the United States in such cases made and provided.

All of which is respectfully submitted.

N. A. ACKER,
Solicitor for Appellant.

[Endorsed]: Filed Apr. 27, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [107]

(Title of Court and Cause.)

Order Allowing Appeal.

On motion of N. A. Acker, Esq., solicitor and counsel for Eloesser-Heynemann Co., the complainant in the above-entitled cause, it is Ordered that an appeal to the United States *District* Circuit Court of Appeals for the Ninth Circuit from the final Order or Decree filed and entered herein, to wit, on the 23 day of April, 1923, be, and the same is hereby allowed, and that a transcript of the record, testimony, exhibits and all proceedings herein be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit, upon said complainant, Eloesser-Heynemann Co., giving a bond in the sum of 300 dollars.

BOURQUIN,
J.

[Endorsed]: Filed Apr. 27, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [108]

(Title of Court and Cause.)

Order Directing Transmission of Exhibits to Circuit Court of Appeals.

Good cause appearing therefor, on motion of N. A. Acker, Esq., of counsel for complainant, it is or-

dered that all exhibits introduced on behalf of the complainant and on behalf of the defendant shall be withdrawn and transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, to be used upon the hearing of the appeal in said Court.

BOURQUIN,
District Judge.

Dated Apr. 27, 1923, at San Francisco, Cal.

[Endorsed]: Filed Apr. 27, 1923. Walter B. Maling, Clerk. [109]

Premium charged for this bond is $10.00 per annum.

AMERICAN SURETY COMPANY
OF NEW YORK.

(Title of Court and Cause.)

Bond on Appeal.

That we, Eloesser-Heynemann Co., appellant herein, a corporation duly organized and existing under and by virtue of the laws of the State of California and having its principal place of business in the city and county of San Francisco in said State, as principal, and the American Surety Company, of New York, a corporation organized under the laws of the State of New York and duly authorized to transact business in the State of California as surety are held and firmly bound unto the above-named appellee, Kuh Bros., in the sum of Three Hundred Dollars, lawful money of the United States of America, to be paid to the said appellee,

its successors, and legal representatives, to which payment, well and truly to be made we bind ourselves and our heirs, executors, administrators and successors jointly and severally, firmly by these presents.

Dated this 28th day of May, 1923.

The condition of the above obligation is such that whereas the appellant Eloesser-Heynemann Co., has taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse a final order or decree rendered and entered by the District Court of the United States, Ninth Judicial District, in and for the Northern District of California, Second Division, in the case entitled Eloesser-Heynemann Co., vs. Kuh Bros., In Equity #615, which said final order or decree was rendered and entered in the said District Court on the 23 day of April, 1923, being a day in the March term of said District Court.

Now, therefore, if the above-named appellant shall prosecute [110] said appeal to effect, and answer or damages and costs, if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

[Seal] ELOESSER–HEYNEMANN CO.
By H. ELOESSER,
1st Vice-president.

AMERICAN SURETY COMPANY OF NEW YORK, [Seal]
By M. A. BAILEY,
Resident Vice-president.
Attest: E. C. MILLER,
Resident Assistant Secretary.

State of California,
City and County of San Francisco,—ss.

On this 28th day of May in the year one thousand nine hundred and twenty-three before me, John McCallan, a notary public in and for said city and county, State aforesaid, residing therein, duly commissioned and sworn, personally appeared M. A. Bailey and E. C. Miller known to me to be the resident vice-president and resident assistant secretary respectively of the American Surety Company of New York the corporation described in and that executed the within and foregoing instrument, and known to me to be the persons who executed the said instrument on behalf of the said corporation, and they both duly acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office, in the said city and county of San Francisco, the day and year in this certificate first above written.

[Seal] JOHN McCALLAN,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires April 12th, 1925.

Approved:

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jun. 8, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [111]

(Title of Court and Cause.)

Praecipe for Transcript on Appeal.

To the Clerk of Said Court:

Sir:

Please issue citation for appeal and prepare and transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit the following as transcript on appeal.

Bill of complaint;
Defendant's answer and amendment thereto;
Copy of testimony on file herein;
Petition for order allowing appeal;
Assignment of errors;
Order allowing appeal;
Bond on appeal;
Order for withdrawal of exhibits;
Opinion of Court.

N. A. ACKER,
Attorney for Plaintiff.

[Endorsed]: Filed Aug. 21, 1923. Walter B Maling, Clerk. [112]

(Title of Court and Cause.)

Certificate of Clerk U. S. District Court to Transcript of Record

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing

one hundred twelve (112) pages, numbered from 1 to 112, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said Court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals, for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $51.00; that said amount was paid by the plaintiff, and that the original citation issued in said cause is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 11th day of September, A. D. 1923.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern District of California. [113]

Citation on Appeal.

United States of America,—ss.

The President of the United States, to Kuh Bros., a corporation, located and doing business at 15 Battery Street, City and County of San Francisco, State of California, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an

order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Southern Division, wherein Eloesser-Heynemann Co is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable JOHN S. PARTRIDGE, United States District Judge for the Northern District of California, Southern Division, this 24th day of August, A. D. 1923.

JOHN S. PARTRIDGE,
United States District Judge.

(Marshal's Return.)

United States of America,
Northern District of California,—ss 615.

I HEREBY CERTIFY AND RETURN that I served the annexed citation on appeal, on the therein-named, Kuh Bros., a corporation, by handing to and leaving a true and correct copy thereof with Louis Kuh (President of Kuh Bros., a corporation), personally at the City and County of San Francisco, in said District, on the 25th day of August, 1923.

San Francisco, Cal., August 25th, 1923.

J. B. HOLOHAN,
United States Marshal,
By I. W. Grover,
Deputy.

[Endorsed]: M. D. 9917. No. 615. United States District Court for the Northern District of California, Eloesser-Heynemann Co. (a corporation) Appellant, vs. Kuh Bros. (a corporation), Appellee. Citation on Appeal. Filed Aug. 27, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [114]

[Endorsed]: No. 4105. United States Circuit Court of Appeals for the Ninth Circuit. Eloesser-Heynemann Company, a Corporation, Appellant, vs. Kuh Bros., a Corporation, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed September 11, 1923.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.